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MEMORIAL OF THE HEIRS OF FAMILIES  
OF THE CHEROKEE NATION

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CHEROKEE INDIANS.

MEMORIAL

OF

THE HEIRS OF FAMILIES OF THE CHEROKEE NATION OF INDIANS, AND  
THE CHILDREN OF THEIR HEIRS AND REPRESENTATIVES,

PRAYING

*Redress for the wrongs and injuries they have suffered by the officers of  
the United States in relation to certain reservations and pre-emptions of  
lands, and indemnities for improvements and spoliations.*

JANUARY 4, 1848.

Read, and referred to the Committee on Indian Affairs.

*To the honorable the Senators and members of the House of Representa-  
tives of the United States of America in Congress assembled:*

The memorial of the heads of families of the Cherokee nation of Indians, and their children and their heirs and representatives, who, under treaties between the United States and the Cherokee nation, became entitled personally to certain reservations and pre-emptions of lands, and indemnities for improvements and spoliations, &c., most respectfully represents to you the wrongs and injuries which have been done to them by the agency of the Department of War, and the instrumentality of the Commissioner of Indian Affairs, in violation of the good faith of the United States, and in breach of the faith of solemn treaties signed and concluded between the United States and the Cherokee nation.

Your memorialists are far from intending to impute to the Congress of the United States, or the several Presidents of the United States, under whose administrations, respectively, these wrongs were begun and continued, any direct participation in, or knowing assent to, these wrongs and oppressions so committed by their subordinates. But, from the examples of the past, a preservative caution for the future requires that your honorable body and the President of the United States should be distinctly informed of the wrongs which have been inflicted on your memorialists, so that the attention of the Congress and the head of the executive department, and of the Senate, as a component part of the executive department, may be awakened to exert the powers and authorities in them respectively vested by the constitution of the United States, so that the subordinate officers of an executive department may not in future use the power and influence of the executive by surreption, and that the evils which have been caused by the past may be redressed.

Tippin & Streeper, printers.

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By the treaty between the United States and the Cherokee nation of Indians, concluded and signed at Hopewell on the 28th day of November, 1785, (Laws U. S. vol. 1, Bioren's edition, p. 322,) the United States received the Cherokees "into the favor and protection of the United States of America," and "the said Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States, and of no other sovereign whatsoever." By the 4th article the boundary of the Cherokees was defined. By article 9, "for comfort of the Indians, and for the prevention of injuries and oppressions," the United States in Congress assembled are to have the sole right of regulating the trade with the Indians, and managing their affairs. By article 12, "that the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."

By the treaty concluded and signed at Holston July 2d, 1791, (1st vol. Laws U. S., Bioren's edition, p. 326,) the stipulations respecting protection and regulating the trade were repeated. Article 4 defined the Cherokee boundary, so as to cede to the United States a part of their country, in consideration of an annuity.

Article 7, "the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded."

Article 14 relates to the assistance to be given by the United States to the Cherokees to become herdsmen and cultivators of the earth, instead of remaining hunters.

By the treaty concluded and signed 2d October, 1798, near Tellico, (Laws U. S., vol. 1, p. 331, Bioren's edition,) the Cherokees ceded a part of their country, in consideration of an annuity, and of "the guarantee of the remainder of their country forever, as made and contained in former treaties."

Other treaties (and cessions of lands) between the United States and the Cherokees were concluded and signed—

1804, October 24, at Tellico, not ratified by the Senate until 17th May,

1824, (see vol. 7, p. 713, of Laws U. S., Bioren's edition.)

1805, October, at Tellico, (vol 1, p. 335-337, of Bioren's edition.)

1806, January 7th, at Washington, (vol. 1, p. 338, of Bioren's edition.)

1807, September 11th, at Chickasaw Old Fields, (vol 1, p. 340, of Bioren's edition.)

1816, March 22d, at Washington, (vol. 6, p. 684, of Bioren's edition Laws U. S.)

1816, September 14, at Chickasaw council-house, (Bioren's edition Laws U. S., vol. 6, p. 686.)

By the treaty between the United States and the Cherokee nation of Indians, concluded and signed at the Cherokee agency on the 8th July, 1817, (Laws U. S., vol. 6, p. 792, Bioren's edition,) it was recited, that a part of the Cherokees were desirous to engage in agriculture and the pursuits of civilized life, and another part desired to remove west of the Mississippi on vacant lands of the United States; that the United States desired to satisfy both parties; the Cherokees were willing to cede to the United States a part of their country east of the Mississippi river, proportioned to the numbers of the Cherokees who have removed and are about to remove west on the Arkansas river; therefore the Cherokee nation ceded to the United States two parcels of their lands described in the first and second articles of the treaty.

By the third article a census was to have been taken during the month of June, 1818, of the whole Cherokee nation; the census of those on the east side of the Mississippi, who declare their intention of removal west to Arkansas, to be taken by a commissioner appointed by the President of the United States, and a commissioner appointed by the Cherokees on the Arkansas river; and the census of the Cherokees on the Arkansas, and those removing there, and who at that time declare their intention of removing there, shall be taken by a commissioner appointed by the United States, and one appointed by the Cherokees on the east side of the Mississippi river.

By article 4, the annuities due to the whole Cherokee nation to be divided between the Cherokees east and the Cherokees west, in proportion to their numbers, agreeably to the stipulations in the third article; "and the lands to be apportioned and surrendered to the United States, agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right, including these with the lands ceded in the first and second articles of this treaty."

By article 5, the United States agreed to give the Cherokees west, lands on the Arkansas river, at the mouth of Point Removed, in exchange, acre for acre, for the lands ceded in the first and second articles, and for the lands the United States *have*, or may *hereafter receive*, from the Cherokee nation east, as the just proportion due that part of the nation on the Arkansas river, agreeably to their numbers.

By article 7, the United States agreed to pay for all improvements which added value to the lands ceded to the United States within the boundaries expressed in the first and second articles, to be valued, &c.

By article 8, it is agreed and declared as follows: "To each and every head of any Indian family residing on the east side of the Mississippi river on the lands that are now, or may hereafter be, surrendered to the United States, who may wish to become citizens of the States, the United States do agree to give a reservation of 640 acres of land in a square, to include their improvements," in which they shall have a life estate, with "a *reversion* in fee simple to their children, reserving to the widow her dower," whose names are to be "filed in the office of the Cherokee agent, whose office is to be kept open until the census is taken, as stipulated in the third article of this treaty: Provided, That if any of the heads of families should *remove* therefrom, *the* right to revert to the United States: And provided, further, That the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty."

Under this 8th article, heads of Indian families, designating the number of whom the family was composed, (consisting of the head, the wife where there was one, and the children if there were any,) showing the aggregate of the family, were duly registered according to the treaty with the Cherokee agent appointed by the United States; which register was filed, and is now remaining in the office of Indian Affairs, whereby they became duly entitled to reservations under the said treaty of 1817.

On the 27th February, 1819, another treaty was made at the city of Washington, (6th vol. Laws U. S., Bioren's edition, p. 748,) by which the census alluded to in the treaty of 1817 (which had not been taken) was dispensed with, and the Cherokees ceded an additional part of their

country to the United States, by boundaries therein described, upon the terms and for the considerations therein at large appearing; whereof, these in particular are pertinent to the present subject:

By article 1st, the United States accepted the lands so therein described and ceded by the Cherokees, "in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who *have* or may *hereafter* emigrate to Arkansas; and this treaty is a *final* adjustment of that of the eighth of July, eighteen hundred and seventeen."

By article 2d, the stipulations on the part of the United States, contained in the treaty of 1817, to pay for all the improvements of those Indians who removed to Arkansas, which added real value to the lands within the territory ceded to the United States, were renewed, and reservations were given to each head of an Indian family residing within the ceded territory, (those enrolled for Arkansas excepted,) who chose to become citizens of the United States, in the manner stipulated in that treaty, as at large appears in the second and third articles.

By the 5th article the United States stipulated, "that all white people who have intruded, or may hereafter intrude, upon the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act passed thirtieth of March, eighteen hundred and two, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.'"—(Vol. 3, Bioren's edition, p. 462, sec. 5.)

On 6th May, 1828, (vol. 8, of Bioren's edition, p. 1011,) another treaty was concluded and signed at Washington, between the United States and the Cherokee nation west, by which, among other things, to induce the Cherokees remaining in the States under the treaties of 1817 and 1819 to remove and join their brethren in the country on the Arkansas river west of the Mississippi river, ceded by the United States to the Cherokee nation, it was agreed, "on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States east of the Mississippi, who may desire to remove west, shall be given, on enrolling himself for emigration, a good rifle," &c., &c.; "also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall be borne by the United States," &c., &c., as by the 8th article of that treaty at large appears. Under this treaty some of the heads of Indian families enrolled for removal, and did remove to Arkansas, with their families.

The white people intruded on the lands reserved to the Cherokees, as well on the national domain of the Cherokees, as on the particular tracts reserved in fee simple to the heads of families, under the treaties of 1817 and 1819. The State of Georgia passed laws to deprive the Cherokees of their lands and of their domain; to sell all the lands within the limits of the State of Georgia, as of the public domain, to extend the laws of Georgia over the lands reserved either to the families of Cherokees, or to the Cherokee nation; to put down the laws and customs of the Cherokees, and to subject their persons and property within the limits claimed by the State of Georgia to the laws of that State, as will be seen at large by reference to the several statutes enacted by the legislature of Georgia; copies whereof are deposited and remaining in the office of the Department of State, at Washington.

For removal of the white people who had obtruded, in numbers, under the laws of Georgia, upon the lands reserved to the Cherokees, application was made to the President of the United States for redress, by executing the provision contained in the 5th article of the treaty of 1819, and the law of the United States therein referred to and promised to be enforced. Such redress was not granted; neither the treaty, nor the law enacted by the Congress in that behalf, was executed.

An application was made by the Cherokee nation, by bill in equity, to the Supreme Court of the United States, against the State of Georgia, for relief, by injunction against the execution of the acts of Georgia of 1828 and 1829, as contrary to the constitution of the United States and the treaties and laws of the United States made in pursuance thereof, and for general relief. No redress was granted to any extent by the Supreme Court, because the Cherokee nation was not a foreign State in the sense in which that term is "used in the constitution of the United States, and cannot maintain an action in the courts of the United States against a State; that the Cherokees were a domestic dependent nation, in a state of pupillage, their relation to the United States resembling that of a ward to his guardian."

The wrongs and grievances detailed in that bill, for which the Cherokees sought redress, are but too true and notorious. To that case, decided by the Supreme Court, January term, 1831, reported in 5 Peters, p. 1 to 80, reference is made for the particular injuries and wrongs then done and threatened to be done to the Cherokees, and for the reasoning of the justices of the Supreme Court as to the rights of the Cherokees, the wrongs done them, and the grounds upon which the court declined to entertain jurisdiction.

These wrongs by the people of Georgia were followed by an act of their legislature of December, 1833, to regulate Indian occupancy, or rather to dispossess the Cherokees of their houses, lands, improvements, and possessions within that State.

By the example of what had been begun and acted in Georgia against the Cherokees, others of the States passed laws to sell out, as of the public domain of the State, the reservations made to Cherokee families by the treaties of 1817 and 1819, and all the lands of the Cherokees within the limits of their respective States. In consequence of these laws of the several States, many Cherokee families were forcibly dispossessed, their houses pulled down over their heads, and threats of personal violence made, if they did not depart from their houses, improvements, and lands. A general sense of insecurity and danger pervaded the Cherokees, as well the families having elected to become citizens of the United States and residing on their lands reserved to them by the treaties of 1817 and 1819, as the families residing on the unceded lands lying within the limits claimed by the States respectively. Agents of the United States had in some instances sold the lands reserved to Indian families.

For these accumulated and accumulating wrongs the Cherokees again applied to the President of the United States for fulfilment of the 5th article of the treaty of 1819, by removing the intruders, according to the stipulations of the treaty and the law of 1802. By the agreement and cession entered into on the 4th April, 1802, between the United States and Georgia, the federal government had incurred certain express obligations to the State of Georgia, recited in the second, third, and fourth conditions of

the cession made by Georgia to the United States of the jurisdiction, soil, and domain of the lands described in the first article, and particularly "that the United States shall, at their own expense, extinguish, for the use of Georgia, as early as the same can be peaceably obtained on reasonable terms, the Indian title" to all the lands within the State of Georgia. The relation between the federal and the State governments, their relative powers, authorities, and rights of jurisdiction, domain and sovereignty, seemed to impose an implied obligation and trust upon the federal government to exercise the treaty making power for the welfare of the States, respectively, by extinguishing the Indian title; and not to their prejudice, by divesting them of their jurisdiction over the lands lying within their respective limits, by granting them out to individuals, and introducing within the State another government, with a guarantee on the part of the United States of protection to this *imperium in imperio*. These obligations, express and implied, to the several States, when compared with the treaties of Hopewell in 1788, and Holston of 1791, and of 1817 and 1819 with the Cherokees, seemed to have placed the federal government in the attitude of having incurred inconsistent obligations to the States of Georgia, North Carolina, and Tennessee on the one hand, and the Cherokee nation and to individuals of the Cherokee race on the other. Under these circumstances, the task of executing the treaty of 1819 by removing the white people who had intruded, under color of the laws of the several States, and under color of sales by the United States, upon the lands of the Cherokees, also was beset with difficulties and responsibilities.

To appease the Cherokees by inviting them to another treaty, in which provision should be made for redressing all their wrongs, was more easy than to fulfil the treaties which had been made with the Cherokees, thereby to arouse the people and the powers and authorities of the several States who had granted out the lands as parcels of their domain, contrary to the treaties of the United States with the Cherokees.

With a view to adjust and terminate these difficulties, a negotiation was set on foot in February, 1835, which ended in the treaty of New Echota, signed by William Carroll and J. F. Schermerhorn, commissioners on the part of the United States, and by Major Ridge, James Foster, Stand Watie, John Ridge, and others, on the part of the eastern Cherokees, and by James Rogers and John Smith on the part of the western Cherokees, (vol. 9 Laws U. S., Bioren's edition, p. 1339;) to which articles, as originally signed, five supplemental articles were concluded and signed on the first of March, 1836, ratified by the Senate with amendments, and promulgated by proclamation of the President of the United States of the 23d May, 1836.

The compensations and indemnities, considerations and inducements, to the Cherokees, by the United States promised, will appear at large by reference to the treaty.

The 12th article promised pre-emptions of 160 acres of land to such heads of Cherokee families as desired to reside within the States of North Carolina, Tennessee and Alabama, subject to their laws.

Article 13 provided that all the Cherokees, their heirs or *descendants*, to whom any reservations have been made under former treaties, and who had not sold or conveyed the same, and which reservations have been sold by the United States, shall be entitled to compensation at the present value of the lands:



All reservations not sold by the United States, to which the families were entitled, were confirmed:

Reservees, obliged by the laws of the States to abandon them, or purchase them from the State, to be entitled to the present value of the land abandoned, or to the purchase paid, as the case may be.

Article 16 stipulated that the Cherokees should have two years from the ratification of this treaty to remove to their new homes; during which time the United States "shall protect and defend them in their possessions and property, and free use and occupation of the same;" and persons "dispossessed of their improvements and houses, and for which no grant has actually issued previously to the enactment of the law of the State of Georgia of December, 1833, to regulate Indian occupancy, shall be again put in possession, and placed in the same situation and condition, in reference to the laws of Georgia, as Indians not dispossessed; and if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof."

By the first supplemental article "all the pre-emption rights and reservations provided for in articles twelve and thirteen shall be, and are hereby relinquished, and declared void."

By the third supplemental article the sum of \$600,000 was allowed to the Cherokees, to include the expense of removal, &c., "and to be in lieu of the said reservations and pre-emptions, and of the sum of \$300,000 for spoliation," &c. "This sum to be applied and distributed agreeable to the provisions of the said treaty," &c.

By the 17th article "all the claims provided for in the several articles of this treaty shall be examined and adjudicated by General William Carroll and John F. Schermerhorn, or by such commissioners as shall be appointed by the President of the United States for that purpose; and their decision shall be final; and on their certificate of the amount due the several claimants, they shall be paid by the United States. All stipulations in former treaties which have not been superseded and annulled by this, shall continue in full force and virtue."

This article was amended in the Senate by striking out the names of the commissioners, General William Carroll and John F. Schermerhorn, and giving the appointment of the commissioners to the President of the United States, by and with the advice and consent of the Senate.

The Senate struck out article 20. When so amended, the treaty was declared ratified and obligatory by proclamation of the President of the United States on 23d May, 1836, without submitting the amendments to the Cherokees for their consent.

The treaty of New Echota upon its face promises compensations and indemnities to the Cherokees, on account of failures of the United States to fulfil stipulations and engagements in former treaties. Faithful memorials of past events but too well attest the wrongs and injuries the Cherokees have endured in consequence of the failure of the United States to perform their engagements to them.

By treaties between the United States and the Cherokees, the United States have acquired cessions of all the lands of the Cherokees east of the Mississippi river, described in the treaty of Hopewell; the Cherokees have removed west to the river Arkansas, and have faithfully performed and fulfilled their engagements to the United States; and yielded their lands in

Georgia, North Carolina, Tennessee, and Alabama, according to the treaty of New Echota.

Notwithstanding eleven years and more have elapsed since the ratification of the treaty of New Echota was proclaimed, very many of the compensations and indemnities promised by that treaty are yet unpaid and unperformed, although the Cherokees have been anxiously seeking their dues. The Cherokees can take no pleasure in a recital of those wrongs; but have an earnest desire, and abiding confidence, that the blot which has happened by the past will be effaced and purified by the future; that the engagements of the United States to the Cherokees, in the several articles of the treaty of New Echota, will yet be interpreted in candor and performed in good faith.

To that end it is necessary and proper that the past shall be brought to open view, examined, reprehended, and amended.

The means by which the fulfilment of the treaty of New Echota, on the part of the United States, has been delayed and hindered by the executive department, may be comprised under the following heads:

1. The powers assumed and exercised by the Commissioner of Indian Affairs in issuing instructions and directions to the court of commissions as to the principles upon which they should adjudicate, and how they should not adjudicate; instructing them that whole classes of claims should be rejected, and in other respects dictating to the commissioners; which assumption of powers, and instructions from time to time given, were illegal, insidious, contrary to the law of nations, a breach of faith, and in fraud of the treaty.

2. The Commissioner of Indian Affairs instructed the board of commissioners to close their session, and dissolved the first board on the 5th March, 1839; assumed upon himself the power to review and reverse the decisions of the court of commissioners; to grant or reject claims; refused to pay the certificates of the commissioners; and directed the commissioners not to issue certificates until further directions.

3. The first board was dissolved by the Commissioner of Indian Affairs; the second board was appointed November, 1842, and dissolved by the President of the United States on the 17th January, 1844, by removing Messrs. Eaton and Hubley without just cause; the third board was commissioned in June, 1844, and was dissolved 17th June, 1845; the fourth board was commissioned in July, 1846, and was dissolved in July, 1847.

4. All commissions were "during the pleasure of the President," by which, and the aforementioned causes, the independent tenure of office ordained by the treaty of New Echota has been destroyed, and the security for the claimants provided by the 17th article has been impaired.

5. The decisions by the commissioners in various cases not susceptible of doubt are so palpably erroneous as to warrant the inference that these were premeditated wrongs, superinduced by the wrongful instructions of the Commissioner of Indian Affairs.

Between the dissolution of the first board and the session of the second, an interval of three years and nine months elapsed; between the dissolution of the second board and the session of the third, there was an interval of six months; between the dissolution of the third board and the session of the fourth, there was an interval of thirteen months. That board was dissolved in July, 1847; so that there is no existing commission. Claims,

with the evidence in support of them, have been forwarded since the dissolution of the last board.

Whatever of harshness may appear in the foregoing allegations of the obstructions which have been thrown in the way of the Cherokees in their efforts to obtain their dues, under the treaty of New Echota, it is justified by truth, sustained by documents and written evidences of undoubted authenticity, by the transcript of letters from the office of Indian affairs, communicated by the Secretary of the Department of War to Congress, in obedience to resolutions of the one or of the other house of Congress, and by records and evidences of the decisions of the commissioners, filed in the office of Indian affairs.

As a preface to the instructions to the commissioners which issued from time to time from the office of the Commissioner of Indian Affairs, we will bring to mind certain maxims or general principles respected by all nations as of universal obligation:

1. Neither the one nor the other of the interested contracting powers has a right to interpret the treaty at his pleasure. For if I am allowed to explain my promises as I please, I may render them vain and illusive by giving them a sense different from that in which they were presented and accepted. (Vattel, book ii, chapter xvii, page 227, sec. 265; and the like by Grotius, book ii, chapter xvi, par. 1, page 352.)

2. If he who can and ought to have explained himself clearly and plainly has not done so, it is worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed. This is a rule proper to repel and cut off all chicanery. The equity of this rule is visible, and its necessity not less evident. (Vattel, page 226, sec. 264.)

3. The faith of treaties forms all the security of the contracting parties. This faith is not less wounded by a refusal to receive an evidently right interpretation, than by an open infraction. It is the same injustice, the same infidelity; and for one of them to involve himself in the subtleties of fraud, is not less odious. (Vattel, page 228, sec. 269.)

4. It is a gross quibble to fix a particular sense to a word in order to elude the true sense of the entire expression. When we manifestly see what is the sense that agrees with the intention of the contracting powers, it is not permitted to turn their words to a contrary meaning. The intention sufficiently shown, furnishes the true matter of the convention of what is promised and accepted, demanded and granted. (Vattel, page 230, sec. 273, 274.)

5. The contracting powers are under an obligation to express themselves in such a manner as they may mutually understand each other. If this was not the case, their contract could be nothing but either sport or a snare. They should employ the words in the sense which use and custom have given them.

Technical terms, or terms proper to the arts and sciences, ought commonly to be interpreted according to the definition given by the masters of the art. Commonly it should be so, but this rule is not so absolute that we ought not to deviate from it when we have good reasons to do it; as, for instance, when it appears that he who speaks in a treaty, or in any other public writing, did not understand the art or science; that he knew not its force as a technical word; that he has employed it in a vulgar sense, &c. If terms of art, or others, relate to things that admit of different degrees, we ought not scrupulously to attach ourselves to definitions; but

rather to take the terms in a sense agreeable to the discourse of which it is a part. (Vattel, book ii, ch. xvii, sec. 271, 276, 277, pp. 229-231; Grotius, book ii, ch. xvi, par. 2, p. 353.)

6. There is not any language that has not words which signify two or many different things or phrases susceptible of more than one sense. Thence arise mistakes in discourse. Contracting parties ought to avoid them. To employ them with design, in order to elude engagements, (or to entrap,) is a real perfidy, since the faith of treaties obliges the contracting parties to express their intentions clearly. (Vattel, p. 232, sec. 279.)

7. Every interpretation that leads to an absurdity ought to be rejected: we should not give to any instrument of writing a sense from which follows anything absurd.

The interpretation that renders a treaty null and without effect cannot be admitted; for it is a kind of absurdity to suppose that the terms of the treaty (or an article of a treaty) should be reduced to nothing. (Vattel, book ii, chap. xvii, sec. 282, 283, pp. 233, 234; Grotius, book ii, chap. xvi, par. 6, p. 355.)

8. "Frequently, in order to abridge, people express imperfectly and with some obscurity what they suppose is sufficiently elucidated by the things that precede it, or even what they propose to explain afterwards; and besides, the expressions have a force and sometimes even a different signification, according to the occasion, their connexion, and relation to other words." The connexion and relation of things themselves serve also to establish the true sense of a treaty. The interpretation ought to be made in such a manner that all the parts appear consonant to each other, that what follows agrees with what went before; for it is presumed that the authors of the treaty had a uniform steady train of thought; that they have intended to explain one thing by another; that one and the same spirit reigns throughout the treaty. Therefore we ought to consider the whole discourse together, in order perfectly to understand the sense of it, and to give to each expression not so much the signification it may receive in itself, as that which it ought to have from the thread and spirit of the discourse. It is the office of a good expositor to make construction on all the parts together, and not of one part only by itself: *nemo enim aliquam partem recte intelligeri possit, antequam totum iterum atque iterum perlegerit.* (Vattel, p. 235, sec. 285—Lincoln College's case, 3 Co. 59, (b); Grotius, book ii, chap. xvi, par. iv, sec. 2; par. vii, pp. 354, 355.)

9. As two articles in the same treaty may relate to each other, two different treaties may do so too, and in such case are to be explained by one another. (Vattel, p. 236, sec. 286.)

10. The reason of the law, treaty, or promise, does not only serve to explain the obscure or equivocal terms, but also to extend or to confine the dispositions independent of the terms to the views and intention of the contracting powers, rather than to their words; the language invented to explain the will ought not to hinder its effect. Good faith affixes itself to the intention; fraud insists on the words when it thinks it can conceal itself under them. The reason of the law or treaty ought to have great attention, as one of the most certain means to establish the true sense, and to explain an obscure, equivocal, and undetermined point. (Vattel, sec. 287, 290, 291, pp. 237, 239; Grotius, book ii, chap. xvi, par. 8, p. 355; *Stowell v. Zouch*—Plowden, 363; *Eyston v. Studd*—Plowden, 205.)

To these general maxims, principles, and rules, quoted from high authorities, we add these other axioms or self-evident truths:

11. That in a treaty each several article is the consideration of all the other articles, and all the articles together make the consideration of each particular article.

12. That the acts of the Commissioner of Indian Affairs done in his official character, reported to the Congress and never disavowed by the President of the United States or Secretary of the Department of War, are to be taken to be the acts of the Executive power, although the President may not have given his particular order or assent to such acts.

13. The seventeenth article of the treaty of New Echota provided for a commission, for a judicial tribunal, for judges, before whom all the claims arising under or provided for in the several articles of this treaty are to be "examined and adjudicated," and "their decision shall be final."

14. That the decisions of these judges of this tribunal, erected and constituted by the mutual concurring wills and agreement of the two contracting nations, were not subject to be revised or reversed by any other tribunal, officer, or authority exercised under the United States, one of the interested contracting powers, and an exercise of such a power by the United States would be an arbitrary assumption against right, and a breach of the faith of the treaty.

15. A power and authority in one of the parties to judicial proceedings, directly interested in the decisions to be given, to tamper with the judges or jurors to bend them to his will, or by his letters missive to instruct them what decisions they shall make, that whole classes of cases are to be decided in his favor; and as to others, that they must defer their decisions or evidences thereof, until he is ready to pay or until further instructed, is against the rudiments of natural justice, repugnant to the common sense and feelings of all mankind, Christians and barbarians, and hostile to the genius and spirit of the State and federal institutions. That such a power has been exercised for the government, and not for individual personal advantage, is a difference in the manner only which does not absolve, but aggravates the injustice. "*Fraus enim adstringit, non dissolvit perjurium.*"

The instructions which had issued from time to time, have been drawn forth by parts and parcels. They were concealed from the claimants, and the whole extent of the instructions issued from the office of Indian Affairs to the commissioners was not developed until January 14, 1847, when the Secretary of War answered a resolution of the Senate, drawn in such comprehensive terms, calling for the instructions, as to leave no room for a play upon the letter of the call. That communication (of January, 1847) brought to light various instructions, commencing as far back as June 20, 1837, not before communicated.

By letter of January 24, 1838, Mr. Harris thus instructed the commissioners: "It has been supposed in this office that all *valid* claims for improvements abandoned by the Cherokees under the treaty of 6th May, 1828, with the portion of the nation west, have been paid for, or otherwise satisfactorily accounted for. If any such shall be laid before you, you will proceed to examine them, and receive all the evidence in their support, and forward the whole to this office for the purpose of comparing them with the valuations and pay rolls here, before any order will be made in relation to payment."

This mode of trial by withdrawing the evidence from the court, and

transmitting it to an executive officer for further testimony to be taken and determined on by him, and not produced before the court, is a proceeding not warranted by any principle, nor accordant with the 17th article of the treaty.

On the 5th February, 1838, Mr. Harris wrote to the commissioners: "It is the opinion of the department proper that you should establish a rule not to review any case that has once been decided."

Upon these letters the interference by this executive officer with the duties of the court of commissioners is apparent. At present it is sufficient to say that the rule directed to be established, "not to review any case that has been once decided," goes back to the rude ages and crude notions of proceedings in courts of law, when remedies by trials by battle, and attaining jurors for false verdicts prevailed; when, by an intolerable strictness in granting new trials, persons were driven into courts of equity for relief by decrees for new trials at law for the purposes of justice. For two centuries the practice of new trials at law, and rehearings in equity and bills of review, has prevailed as necessary to the purposes of justice. In the case of *Bright v. Eynon*, (1 Burrow, p. 393,) Lord Mansfield declared, "It is absolutely necessary to justice that there should on many occasions be opportunities of reconsidering the cause by a new trial." "Of late years the courts of law have gone more liberally into granting new trials, according to the circumstances of the respective cases. And the rule laid down by Lord Parker, in the case of the *Queen* against the corporation of *Helston*, 12 Ann, (Lucas's Rep., p. 202,) seems to be the best general rule that can be laid down on the subject, viz: doing justice to the party, or, in other words, attaining the justice of the case."

On the 19th June, 1838, Mr. C. A. Harris, Commissioner of Indian Affairs, addressed a letter to the commissioners in these words and figures: "Gentlemen, I am directed by the Secretary of War to instruct you that, in his judgment, no payments whatever should be made on account of reservation claims under the treaties of 1817 and 1819, either to the Indian reservees or to their assignees. But you are to proceed in and to complete the examination of these claims, and to report each case and the testimony bearing upon it to this department. If, as there seems to be reason to apprehend, more extensive powers will be required to enable the agents of the government to arrive at the truth, such measures as may seem proper will be adopted."

By this mandate from the office of the Commissioner of Indian Affairs, by the direction and authority of the Secretary of War, (as the writer stated,) the commissioners, the judges, appointed by virtue of the 17th article of the treaty of New Echota, were reduced from their high estate as arbiters appointed under a treaty of the two contracting nations, transformed into servants and handmaids to the Commissioner of Indian Affairs, stripped of their judicial robes, and distaffs were put into their hands, with orders to spin for the use of the office of Indian affairs!

From the condition of the two contracting powers, the power, wealth, and influence of the one party, and the comparative weakness and poverty of the other party; from the high confidence reposed by the Cherokees in giving to the United States the appointment of the judges, without any voice by any senator, representative, or delegate elected on the part of the Cherokees; and from the nature of the duties to be performed by the persons to be appointed, it was but a reasonable expectation on the part of the Chero-

kees, and a moral duty incumbent on the appointing power of the United States, to use reasonable circumspection and good faith to select as the arbitrators persons of integrity, firmness of purpose, high intellectual capacity and fitness; "*liberos et legales homines omni exceptione majores.*" And when appointed, the United States were bound by the faith of treaties, which is declared sacred by the law of nations, that they should have been left free to adjudicate according to their unbiassed judgments of the sense and meaning of the treaty.

The powers so assumed by the Commissioner of Indian Affairs to impose authoritatively his construction of the treaty, and an interpretation so manifestly wrong, and to revise and reverse the decisions of the commissioners, were, according to axiom 12, before stated, the acts of the Executive of the United States, and were contrary to the axioms 1, 3, 14, and 15, before stated, and a breach of the faith of the treaty.

By the letter of the Commissioner of Indian Affairs of the 17th January, 1839, to the commissioners, Messrs. Kennedy, Wilson, and Liddell, they were instructed to terminate their session and transmit their registers, documents and papers to the office of Indian affairs, whereby the commission was by that order broken up and dissolved on the fifth day of March, 1839, before the business of the commission under the 17th article of the treaty of New Echota was completed. (See rep. No. 391, 28th Cong., 1st sess., March 29, 1844—letter C, p. 9; and report of T. H. Crawford—I, page 3S.)

Thus, the court of commissioners constituted under the 17th article of the treaty was broken and dissolved by the act of the officer of the United States, the one contracting interested party, without the consent of the other contracting party. This was a wrong, a violation of the faith of the treaty. The Cherokee claimants were compelled to apply to the Congress to revive the court of commissioners; and the first session of the new court of commissioners commenced in December, 1843, about three years and nine months after the Commissioner of Indian Affairs had broken up the former.

Before the session of the new court, consisting of Messrs. Eaton and Hubley, (the latter appointed in place of Mr. Iredell, who refused to accept,) the Commissioner of Indian Affairs issued his instructions to these commissioners by letter dated September 28, 1842, (Doc. No. 391, p. 17, House of Representatives, 28th Congress, 1st session, vol. 2 of Repts. 1843, 1844.) Out of the many instructions therein, the following are highly improper, amongst others:

1. "The 17th article makes the decisions of the commissioners final that have been already had, and reported by the former board to this department. Even the Executive cannot overrule them where they had jurisdiction; and if they have none, you cannot possess it. You are therefore *instructed* that no case which has been adjudicated by the former board is open to your examination; and one of the great objects in furnishing you with its records, is to enable you to detect at once any application to you for the consideration of *cases of any description* that have already been passed on by the former board, which will be rejected."

2. "Valuations of improvements not already made and not appearing by the records of the former board;" "and even then, if you are not satisfied with their correctness, valuations must be made of all such improvements as are *subject to your jurisdiction under these instructions*, and were in the possession of the Cherokees at the *date* of the treaty, not at its *ratifica-*

tion, or add any value to the lands, and also of the ferries owned by them at the same time," &c.

3. "Claims under the 16th article, if any such should be preferred, it has been already stated would not be entitled to your favorable consideration." "A law was passed by Congress appropriating \$50,000 to purchase certain tracts of land in the State of Georgia, reserved to the Indians by the treaties with the Cherokees of 1817 and 1819." Instructions were issued to Col. D. G. Campbell, &c.; they returned a list of reservees of whom they had purchased, showing they had paid \$45,665 to them. "It is *presumed* all those fairly entitled to its provisions applied under this act; and if they did not, that they are *guilty of laches*, which would operate in bar of their claims now. It is probable the 16th article was inserted to satisfy all parties who could claim, but all such should be very closely scrutinized; and if they *might have availed themselves* of the law of 1828, and did not do so, they ought not now to receive your decree in their favor."

4. "The claims for reservations which were taken under the treaties of 1817 and 1819, according to an opinion of the Attorney General of 14th of May, 1838, but which are on the land ceded in 1835, are entitled to no compensation for the reservations, because they were unauthorized, and should have been located on the cessions of 1817 and 1819;" but if improved, then the improvements only should be paid for, under the ninth article.

5. "There are no pre-emption rights; they were provided by the 12th article of the original treaty, but abrogated by the first of the supplemental articles, and never had more than an *inchoate existence*, which is gone." Such are the instructions given by the Commissioner of Indian Affairs to the court of commissioners under the 17th article. They are interpretations of the treaty given according to axiom 12, by the Executive of the United States, and being so imposed authoritatively by the United States, the one of the interested contracting powers, are in violation of the 1st, 3d, and 15th axioms before mentioned.

In so doing there was a double wrong: first, in not leaving the court of commissioners free to make their own interpretations and constructions; secondly, in making interpretations erroneous and in direct opposition to the true sense and meaning of the treaties.

The instruction that this court of commissioners had no jurisdiction over cases decided by their predecessors is totally wrong, and was intended to perpetuate the errors committed by their predecessors, in many cases so palpably erroneous as to excite the inference that they were the results of some influence foreign to the treaty, which had blinded their judgments, rendered their consciences torpid and passively obedient to such extraneous influence, to which the instructions issued by the Commissioner of Indian Affairs, Mr. Harris, was the key.

The court of commissioners agreed by the treaty was the court established by the authority and concurrent will of both the contracting powers. The judges when appointed were in by the treaty; their tenure of office was by the treaty. The court was no more dissoluble by the sole will of the United States, in good faith and of right, than any article of the treaty, or the whole treaty. The ligament of the treaty being tied by the concurrent powers and wills of the two contracting nations, could not, in good faith, be untied and dissolved in any other manner than that by which it had been tied and created. "Unum quodque dissolvitur eo modo quo colli-



gatur," is a maxim of law between nations, as well as between individuals, who contract obligations.

To grant commissions to persons appointed to examine and adjudicate under the 17th article, to hold during the pleasure of the President of the United States, was a departure from the treaty; the offices were created by the treaty.

The constitution of the United States operating upon treaties made in pursuance thereof, declares them to be the supreme law of the land. From the terms of the treaty and the ratification thereof the President derives his power to appoint, and the Senate derive their advisory power in respect of these commissioners provided by the 17th article. The treaty creates a judicial tribunal, to be holden by commissioners, by whom "all the claims arising under or provided for by the several articles of this treaty shall be examined and adjudicated." As well might the President commission judges of the Supreme Court to hold during his pleasure, as to commission these judges under the 17th article of this treaty during his pleasure. Their authority of office as judges is dignified by the powers of the two contracting nations, who, by their joint powers, have created a judicial tribunal, having a jurisdiction to decide in cases wherein the majesty of the government of the United States is the party defendant and to be adjudged as debtor.

The judicial tribunal so created by the treaty is not an inferior court. It is not a court whose decisions are liable to be reviewed and reversed by the United States, or by any officer of the United States. The jurisdiction of the court arises out of the treaty, and is coextensive with the claims arising under or provided for by the treaty. In that respect and to that extent it is not of limited jurisdiction.

The duration of the court is limited to no fixed period of time: no fixed stated terms are prescribed by the treaty. The business to be transacted under the treaty is the only limitation to the term and session of the court. From the first to the last sitting of the court it is all one term, one and the same court, possessing the same powers, no matter how the persons constituting the court may be changed by resignation, death, or other casualty. When Mr. Lumpkin resigned, after many adjudications, and Mr. Wilson was appointed his successor, it was nevertheless the same court of the treaty, possessing all the powers of the treaty. The powers of Messrs. Kennedy and Wilson were coequal with the former powers of Messrs. Lumpkin and Kennedy whilst they constituted the commission. When Mr. Liddell was added to the commission the powers of Messrs. Kennedy, Wilson, and Liddell were coequal with the powers of Messrs. Lumpkin and Kennedy whilst they were in commission, or of Messrs. Kennedy and Wilson when they composed the commission and the court.

That the President of the United States may at his pleasure, and without cause, by dismissing the court, or the judges of the court, and appointing others, break the sittings into separate and distinct terms, or divide, constrict, or lessen the powers and jurisdiction of the successors as often as new commissions are granted, cannot be maintained by reason. Such a power is contrary to the principles of the law of nations and the faith of treaties. Neither party can by his act alter the meaning and effect of the treaty.

The United States cannot be sued for the demands of the Cherokees in the ordinary courts, nor in the Supreme Court of the United States, nor

in any other court of judicature but in that established and agreed by the treaty of New Echota for the examination and adjudication of those claims. The decision of that tribunal as to the amount due to each claimant is veritable and final, and to be paid by the United States. This provision for a tribunal to examine and adjudicate between the respective claimants as plaintiffs and the United States as defendant, is the great, solid, and most effective security which the Cherokees have for the several indemnifications and other claims upon the United States mentioned in the treaty. If the United States can make the tenure of office of these judges dependant upon the mere pleasure and will of the President of the United States; if he can dismiss them from office at his will, dissolve the court, and refuse or delay to appoint others; instruct them of what cases they shall take cognizance, and of what they shall not; instruct them what decisions to give; not to issue certificates; instruct them as to the interpretations given by the United States, the one of the interested contracting parties, and the debtor party; curtail their jurisdiction by instructing them not to take cognizance of this or that class of cases, as not appertaining to their jurisdiction, and after they have decided revise and reverse their decisions upon the ground that they have exceeded their jurisdiction, or because they have decided erroneously—then the security provided for the Cherokees by the 17th article is impaired. No virtuous effect, no solid benefit, grows out of the decisions of the court in favor of the Cherokee claimants; the 17th article of the treaty would by such construction be rendered null, and without effect, except that which the mere will and pleasure of the United States, the debtor party, shall allow to it. A construction which leads to such an absurd consequence, which renders an article in the treaty null and without effect, is contrary to the 8th, 10th, and 11th axioms before cited.

The power belongs to every tribunal of justice, to every deliberative body, to correct its own errors or mistakes, or misjudgments and conclusions. In courts of law the power to grant new trials is clear, and liberally exercised, as before shown by the authority of Lord Mansfield in the case of *Bright vs. Eynon*, (1 Burr. 393, 395;) of Lord Parker in the case of the *Queen vs. the corporation of Helston*, (Lucas's Reports, p. 202,) and the cases referred to by Lord Mansfield. The practice is familiar in all our courts of law. The limitation to the power is, that it be exercised before the authority of the court over the particular case has been cut off by the lapse of time, the rules of practice, or the terms set and prescribed by law to the particular court. In courts of equity, applications for rehearings are entertained liberally, and bills of review to correct errors apparent in the body of a decree, or upon new matter not within the knowledge or power of the party at the hearing, are well known. Bills of review in England are entertained at any time within twenty years after decree enrolled, (1 Harrison's Ch. Prac., chapter 2, pp. 137-140.) Before decree signed and enrolled, a petition for a rehearing to have the benefit of new matter, or to correct errors of fact or law, is the practice. (*Standish vs. Rudley*, 2 Atk., p. 177; *Maddock, Chan.*, pp. 370-272.)

It cannot be doubted that during the same term a court has the power to amend, alter, set aside, and correct any order or decree, or judgment, and to grant a new trial or rehearing upon application of the party aggrieved by an error, or upon the mere motive of the court itself, where the judges

even doubt the correctness of their judgment; much more where the error of the judgment, or decree, is apparent.

The records of the various boards of commissioners appointed by the United States to examine the claims of individuals to the lands in Louisiana purchased of France, and in Florida, purchased by the United States, show that those boards exercised the power (and rightfully exercised it) to set aside rejections of claims made at one period of time, and to affirm the claims at after periods upon new evidence.

The whole time of the sittings from the beginning, in 1836, to the final conclusion of the business under the seventeenth article of the treaty of New Echota, is but one term, and the power of the court of commissioners to grant rehearings of rejected cases is within the sound discretion of the commissioners.

That question as properly belongs to the judgment and decision of the commissioners as any other question under the treaty. They have so decided, and exercised the power of granting new hearings. That subject is not within the control of the United States or the executive officers of the government, any more than any other decision.

The United States cannot have advantage from the wrongs committed by the Executive in putting an end to the first commission, which had no limitation as to time; nor by issuing commissions to be held during the pleasure of the President; nor by dismissing the commissioners without cause; nor by granting commissions for limited terms. Neither an act of Congress, nor an act of the President, can alter the treaty, or restrict the power of the court when constituted and in session under the seventeenth article of the treaty.

The Commissioner supposes the decisions to be final against the commissioners themselves, at the very moment any decision shall be made against a claimant; but not final against the government of the United States. The Commissioner of Indian Affairs claims that "the power is *inherent* which is necessary to discharge an imposed duty, unless prohibited by law." Is not the treaty of New Echota, ratified according to the constitution, a law of the land?

The true meaning of the declaration of the treaty that the decisions of the commissioners shall be final, is that they shall not be re-examined, reviewed, reversed, or set aside, by any other tribunal, court, or executive officer, of either of the contracting powers; that their decisions shall be conclusive as to the matter of right against the two contracting nations, the powers and authorities of each nation, and as against the claimants. That they may be revised, amended, and perfected, by the same tribunal to whom the cognizance is intrusted, is a power necessary and proper to the end for which this court was instituted—the attainment of justice; it is necessarily implied, and in no way inconsistent with the declaration that their decisions shall be final and conclusive against appeal, writ of error, review, or reversal, by any other tribunal or power, judicial or executive.

The decisions of the Supreme Court of the United States are final; not liable to be reviewed, reversed, or set aside by any other tribunal or power, judiciary or executive, exercised under the authority of the United States; but not final and conclusive against that court itself, so as to forbid the granting of re-arguments or rehearings, at the discretion of the court, and for the attainment of justice.

But the opinion of Attorney General Lagaré is brought in aid of this power of the Executive to review the judgments and certificates of the commissioners.

The case upon which the opinion of Mr. Lagaré was given, (and the opinion itself,) is found in the report of the Commissioner of Indian Affairs to the Secretary of War, dated 14th April, 1843.—(O 5, and the letter of the commissioners to the Commissioner of Indian Affairs, dated 25th January, 1839; O 6, pp. 54, 55, of rep. No. 391, vol. 2, House Reps. of 1843-44.) The Commissioner of Indian Affairs states distinctly that the claim as first submitted to the board of commissioners was within their jurisdiction, and that the only objection to the allowance of it by the second board of commissioners was, that the "late commissioners had *virtually* rejected the claim." Mark! "*Virtually rejected the claim.*"

The board of commissioners had distinctly examined what their predecessors in office had done, and upon the facts decided that the former board had not rejected the claim.

Mr. Attorney General Lagaré was asked by the Secretary of War "whether the proceedings that were had before the former board amount to a rejection of the claim."

That is the precise question as stated by Mr. Lagaré himself in the fore part of his opinion. He was asked to review the very question which the board of commissioners had examined and decided. He differed in opinion from the commissioners, and reversed their decision upon the very question discussed and decided by that board.

It cannot be hidden nor disguised that the Secretary of War did apply to Mr. Attorney General Lagaré to review the decision of the board of commissioners upon a point which had been discussed by the commissioners and directly decided by the board, and that he overruled and reversed the decision of the board.

By the opinion of the board of commissioners the proceedings of their predecessors did not amount to a rejection of the claim: by the opinion of Mr. Lagaré, they did.

The commissioners were right in overruling the plea of a former rejection, and Mr. Lagaré erred egregiously in giving his opinion to the contrary.

The commissioners, Messrs. Kennedy, Wilson, and Liddell, wrote to the Commissioner of Indian Affairs on the 25th January, 1839, for Mr. Rogers's papers, which he had withdrawn by their leave. The commissioners had not entered any decision on their record. They wanted the paper that they might enter a decision. When Mr. Crawford received this letter the commissioners had done no final act. They wanted the papers to enable them to do a final act upon *ex parte* communications, after Mr. Rogers had withdrawn his papers and was absent.

If Mr. Rogers had been apprized of this *ex parte* testimony furnished to the commissioners after he had withdrawn his papers by leave of the court and when his claim was not before the court, and not therein pending, and had expostulated and protested against such *ex parte* evidence, or had explained it away, or had asked time to rebut it, or had convinced the court that their opinion intimated to Mr. Crawford was not only erroneous, but an unwarranted proceeding in a case not pending before them, their letter to Mr. Crawford would have been no *estoppel* to them, no bar to their jurisdiction. Notwithstanding this letter to Mr. Crawford, the commissioners had *locus pœnitentiæ*.

Mr. Crawford did not return the papers; the commissioners entered no decision of record; did no final act as a court. They had not the papers before them, nor an application before them by Mr. Rogers; he had withdrawn his papers by leave of the court. If under these circumstances they had entered a decision, they would have acted without any rightful jurisdiction. No court has jurisdiction to adjudicate and extinguish a right, or bar a claim not pending; withdrawn by their leave and when the party is out of court, absent, not notified of any such proceeding and ignorant of it.

When Mr. Rogers presented his application anew after he had withdrawn his papers, it was "*res integra*;" he had the right to fortify his claim by new evidence and arguments.

Is an intention to do an act the act itself? Is an intent to despoil a man of his money a robbery in fact?

But Mr. Crawford did not send the papers. There is no decision by the commissioners rejecting the claim of Mr. Rogers to be found among their records.

When the first board closed their session on the 5th March, 1839, and returned their books, papers, and records to the War Department, no papers of Mr. Rogers were returned by the commissioners; no decision of a rejection of Mr. Rogers's claim was of record as made up for the commissioners by their secretary; there is now no such record.

The board of commissioners under the treaty of New Echota was a court of record, with a secretary to record their adjudications. When Mr. Rogers presented his claim before Messrs. Eaton and Hubley, (the commissioners under the treaty of New Echota secondly appointed,) the United States interposed a plea of decision by a former board rejecting the claim; Mr. Rogers replied, there is no such record. Upon every such plea of *nulli record*, the party alleging a former judgment or adjudication must produce an exemplification, a true copy of the record, or he fails in his plea. The United States could produce no copy or exemplification of any such record of the commissioners rejecting Mr. Rogers's claim. There was no such record of the court of commissioners.

But in place of such record of a decision of the commissioners, the United States offered in evidence the letter of the commissioners to Mr. Crawford, and his answer that he did not send the papers, but he would file their letter with Mr. Rogers's papers, and consider that "sufficient evidence of your rejection of his claim." The commissioners adjudged that it was not a decision made by the board of commissioners, and that it was not a bar. Mr. Legaré revises that decision of the court of commissioners, and thinks it was erroneous. Mr. Legaré says the commissioners reported upon it as unfounded, "and their report was received and recorded as a *judgment* by one of your predecessors." That is, by one of Mr. Porter's predecessors as Secretary of the Department of War. Wonderful to be told! A Secretary of War manufactured in his office a judgment for the court of commissioners after their session had terminated.

Such conduct of the Department of War was without authority, a usurpation; a meddlesome, obtrusive act, having no binding legal force whatever. In disregarding such an act, the commissioners secondly appointed acted discreetly and according to the law and the justice of the case.

The commissioners had no right to call for Mr. Rogers's papers after he had withdrawn them by leave of the court. The Commissioner of Indian Affairs had no right to apply the papers of Mr. Rogers left in his office for one

purpose, to the fabrication of a judgment for the commissioners. The Secretary of War had no rightful authority to manufacture a decision for the court of commissioners. So this whole matter concerning a decision by the commissioners rejecting the claim of Mr. Rogers was a nullity in law, and out of the cognizance of the War Department and of the Attorney General.

The Attorney General has thought fit to make a distinction between the official powers, duties, and jurisdiction of the commissioners first appointed, and those secondly appointed under the seventeenth article of the treaty of New Echota. None such exists in law. Although the *persons* were different, their official powers, duties, and jurisdiction, were derived from the same treaty; they are judges of the same court, with no difference of powers and authorities than if there had been no interruption of the commission by the illegal act of an executive officer. The treaty did not split and divide the sittings of the court of commissioners into terms, such as Hilary, Easter, Trinity, and Michaelmas, assigned to the Court of Kings-Bench. All the successive commissioners, and all their successive sittings, composed one and the same court, and one and the same term, established by the treaty, with no more difference of powers and jurisdiction than between the court of Saturday and the court of Monday.

The Attorney General having first construed the illegal, officious intermeddling of the War Department into "*res adjudicata*" by the former commissioners, calls the application of Mr. Rogers to the secondly appointed commissioners under the same treaty "*an appeal*" from the decision of their predecessors. Names do not change the substances and essences of things. Is an application to the succeeding judges of the same court, deriving their authority and jurisdiction from the same treaty which gave authority and jurisdiction to their predecessors, "*an appeal*" in the legal sense of the term? But suppose the predecessors in office of the same court and same term had decided a case, committed a mistake, or given an erroneous decision upon the facts, or had taken the plaintiff by surprise, is an application to the successors in office of the same court, and during the term, to correct the mistake or set aside the erroneous decision, or to grant a new trial because of the surprise, "*an appeal*" in the legal, technical sense, which the Attorney General has applied to it? Would an application to the Supreme Court of the United States, made during the second week of a term, to set aside a judgment of the first week of the term, be "*an appeal*" from the decision of the Supreme Court? Familiar practice, and the voices of the profession, of judges and counsellors, answer "*No.*"

The Attorney General admits that the judgments of the commissioners under treaties do conclude "*parties to the treaty*;" but makes a distinction between the conclusive effect thereof politically, as between the contracting nations, and the conclusive effect of an award as to the individual rights of the citizens to whose benefit the judgment is to enure.

There is under this treaty of New Echota no room for any such distinction—for any escape from the principle, that the judgment of the commissioners is final and conclusive as between the parties to the adjudication. The treaty of New Echota, made and concluded between the United States and the Cherokee nation, establishes the court of commissioners for the very purpose of examining and adjudicating the claims of individuals against the United States; declares "*that their decisions shall be final; and*

on their certificate of the amount due the *several claimants*, they shall be paid by the United States."

By the terms of the treaty, the cases to be adjudged by the court of commissioners are, the several claims of individuals, as the parties plaintiffs, against the United States as the party defendant—(and most bitterly have these claims been contested and defended by the Commissioner of Indian Affairs.)

This opinion of the Attorney General is in a case properly and clearly within the provisions of the treaty: the effort and intent of the application for the opinion of the Attorney General was to revise and annul the decision of the commissioners, as certified in favor of the claimant.

The case comes to this: Rogers presented his claim to the second board of commissioners for improvements clearly within the stipulations of the treaty. The United States interposed a bar of a former rejection by the commissioners; the second board, upon examination of the matters relied on as being a bar, decided them not a bar. The Attorney General revises the decision, comes to conclusion that the decision elaborated by the War Department ought to have been allowed as a bar, and therefore that the second board had no jurisdiction, and their decision in favor of the claim is a nullity.

If the decisions of the commissioners upon matters directly in issue, and directly decided, are to be overhauled and annulled, because the Attorney General and the Executive officers of the United States differ from the opinion of the commissioners, then the declaration of the treaty that the decision of the commissioners "shall be final," loses its proper meaning and effect.

The Attorney General says: "The present commissioners object that the proceeding was irregular, Rogers having obtained leave to withdraw his papers; and I certainly concur with them, as at present advised, in that view. But the case *was clearly within the jurisdiction of the first board*; was fairly presented, was fully opened; and they, by what seemed to them satisfactory evidence—taken, however, as it is alleged, without sufficient care, perhaps without cross-examination—were convinced that the claim was an unfounded one. They *reported* upon it as such, directly and positively, and their *report* was received and *recorded* as a *judgment* by one of *your predecessors*"!!!

If the Commissioner of Indian Affairs, or the Secretary of War, thought fit to instruct the commissioners to make a report to them for their use and convenience, such report cannot be evidence against individuals, to conclude their rights and interests, and to have the legal force and effect of a decision or judgment, when no such appears in the records of the proceedings of the commissioners done openly and publicly when sitting as a judicial tribunal. Such an attempt, by a Secretary of War, by recording a report in his office for the purpose of making it a judgment of the commissioners, when no such judgment appears in their own records, is impotent in law, and an unadvised assumption of power.

The Attorney General adds: "By what authority did the present commissioners open that judgment? Because it was given in mistake; because there was an irregularity in the proceedings, say they: *that*, if shown in proper time, would be a very good reason for reversing it in a competent court of appeals (but there is none such provided here,) or is a good ground addressed to the discretion of the same court for a new trial; or finally,

may, in re minime dubiâ, justify an interference of the government, party to the treaty, to enforce the doing of justice under it; and in this last case it becomes a political question again as it was at first."

The Attorney General has opened a decision and certificate of the commissioners in a case confessedly and undoubtedly within the stipulations of the treaty. He has exercised the power of an appellate tribunal, reviewed the facts and the law arising out of the facts directly adjudicated by the court of commissioners, upon a plea collateral, and not touching the merits of the claim, but a technical special plea to evade the merits, which are clearly in favor of the claimant. By reversing the opinion of the court upon this minor matter, not at all involving the merits of the claim, the Attorney General came to his conclusion that the court had not jurisdiction. That the first board had jurisdiction to allow the claim, is expressly declared. The questions whether the first board had rejected the claim, and whether that board had not improperly written a letter to the Commissioner of Indian Affairs, and whether that letter should stand for a decision when no decision appeared on the records of the court of commissioners, were questions involved in the decision of the second board, and decided in favor of the claimant. That is the decision reviewed and reversed by the Attorney General; and because he differs from the court of commissioners upon those collateral questions not touching the merits of the claim, he pronounced that the court of commissioners had no jurisdiction. The treaty pronounces that the *Attorney General* had no jurisdiction. Unhonored is the majesty of the treaty, fallen is the dignity of the court established by the treaty to adjudicate finally between the two contracting nations, if the decisions of that court can be reviewed and reversed by a subordinate officer, a retained attorney, of one of the contracting powers.

There was no judgment of the first commissioners to open, except a pretended one, manufactured in the Indian office, or in the War Department, without color of authority but that lawless will which feels power and forgets right. There was good cause for disrespecting that pretended judgment when it was relied on to defeat justice in the same court, although holden before different judges. It was the court established by the treaty; deriving its powers and jurisdiction from the treaty; the same court, whensoever in session; not at all changed as to its powers or jurisdiction, howsoever the particular persons invested with commissions to hold the court might be changed. That there is not any competent court of appeals provided for reversing a decision of the court, whether by the first or the second, or third or fourth set of judges who successively held the court, is clear; not even the whole executive department of the government of the United States could revise and reverse a decision of the board upon the questions, or either of them, presented by the Secretary of War for the opinion of the Attorney General, otherwise than by lawless power and a breach of that public faith which was pledged by the treaty. As to the resort to the *political power* of the Cherokee nation, a party to the treaty, to enforce the doing of justice by the United States, the other party to the treaty, the memorialists have no apprehension, no belief, that such will ever become necessary. On the contrary, they have full belief and confidence that the high authorities of the United States will, when informed of the past, take due care to remove those obstructions which have



heretofore been cast in the way of the fulfilment of the treaty of New Echota.

The Attorney General has asked, "Where does a board of commissioners, authorized only to examine cases not passed upon by the former board, find authority to re-examine one that was?"

That interrogative takes by surreption the proposition that the second board of commissioners was confined, in its authority, within narrower limits than those assigned by the treaty.

Where did the Attorney General find authority to deny the cognizance of the court of commissioners to grant rehearings and new trials in cases passed upon by the former board? Nowhere but in the instruction given by the Commissioner of Indian Affairs to the commissioners. The Commissioner of Indian Affairs could not by his instructions limit the authority of the court established by the treaty, as the Congress of the United States may limit the jurisdiction of the courts respectively established by law. The treaty cannot be altered by the instructions of the Executive. The treaty does not speak of a first and second board, nor of first, second, third, and fourth terms of the court of commissioners. It provides for commissioners to examine and adjudicate all claims under the treaty. The powers necessary and proper to attain the ends of justice are implied. These include the filling of vacancies which happen by deaths, resignations, &c.; they imply a tenure of office not dependant upon the will of the appointing power, one of the interested contracting parties, and the debtor party; they include the power to grant new trials and rehearings, and to correct irregularities and mistakes.

The Attorney General, to sustain his argument, puts an extreme case, viz: "Had these gentlemen passed sentence of death upon an Indian, they, and all engaged in executing their judgment, would have been guilty of murder." This supposition is not very complimentary to the intelligence or trust-worthiness of the gentlemen appointed by the President, by and with the advice and consent of the Senate. But if such a sentence should have been passed, the commissioners must have given their certificate of the decision in the supposed case somewhat in this form: We certify that we have examined and adjudicated the claim of A B, a Cherokee Indian, and find that the sentence due to him under the treaty is, to be hung by the neck, with a hempen rope, until he is dead; to be paid by the United States, under the Cherokee treaty. Signed, &c. As the expense would have fallen on the treasury of the United States, the Commissioner of Indian Affairs would have discovered that there was no appropriation by the Congress for the expense of the rope, and other incidents, and therefore would have stopped the certificate, (as he has done many others adjudicating money,) and so no murder would have come of it.

The treaty has been ratified by the United States. The decisions of the commissioners are to be final, by the very terms of the treaty. The danger to the treasury of the United States possible under the treaty, was a matter to be considered when the subject was in treaty and under consideration, and before ratification. The government of the United States has the sole power of appointing the commissioners. In that, it has abundant security against the danger to the treasury of the United States from the possible abuse of the powers conferred on the commissioners in the 17th article. It is not, on the part of the United States, a fair argument against letting the certificates of the commissioners have their full and

conclusive effect according to the treaty, that the United States might happen to appoint as commissioners men so ignorant or so little trustworthy as to pass "sentence of death on an Indian."

On the other hand there is a security due to the Cherokees, the other party to the treaty. That security consists in the integrity, capacity, fitness, and independence of the commissioners, and in the final effect of their decisions when perfected and certified. If they may be revised and annulled by the Executive of the United States, upon the pretence that the commissioners have exceeded their jurisdiction, then the Cherokees have not the security contemplated by the sense and meaning of the seventeenth article. The debtor becomes the judge of what he will pay, instead of the judges appointed under that article of the treaty.

It is inconsistent with the terms of that article to say the certificates of the commissioners shall undergo the supervision of the Attorney General of the United States, or of the Department of War. It is a limitation upon the powers conferred upon the commissioners, imposed by the Executive of the United States after the treaty was ratified, contrary to the 2d and 3d general axioms before cited.

In a controversy between two citizens about the terms of a complicated covenant, what would be thought of the fairness of a proposition of the defendant that the meaning and extent of his covenants should be determined by his own retained counsellor and attorney, indoctrinated into the versions of the instrument made by the interested defendant?

The claims presented before the commissioners for adjudication are subjects open to free discussion before the commissioners. Then and there is the time and place for the United States, by their attorneys and counsellors learned in the law, to argue that this or that claim is not within the treaty. After the commissioners have decided and certified their decision, then that the United States shall send that decision to the Attorney General of the United States for his commentary, revision, and opinion as to its validity, is an after limitation and restriction of the powers and authorities of the commissioners, contrary to the final effect of their certificates, as agreed by the seventeenth article of the treaty. It is a supplement, a proviso to the seventeenth article not therein expressed, a mental reservation, a condition, directly repugnant to the sense and plain meaning of that article as concluded, signed, and ratified.

The Cherokee nation, the one party to the treaty, by the seventeenth article had a consideration, an inducement, for the cessions and stipulations on their part, and a security for the fulfilment of the stipulations on the part of the United States in a court of commissioners to be appointed specially to examine and adjudicate all the claims against the United States, whose decisions it was agreed should be final. To this both contracting nations assented. The Cherokees are not subject to the general laws of the United States; they have no voice, no representation, in the enactment of those laws, nor are they bound to take notice of them. The resort to the opinion of the Attorney General of the United States, and its effect upon the officers of the treasury and other departments, are matters of which the Cherokees had no knowledge, nor were they bound by any such. In the treaty no allusion is made to any such power to control the certificates of the commissioners; no such qualification, no such proviso, is annexed to the agreement that the certificates of the commissioners shall be final. To annex such qualifications now that the treaty is ratified, would

be to bind the Cherokees by the laws made for the regulations of the internal affairs of the United States, whereof no nation was bound to take notice in making a treaty with the United States, and is in direct conflict with the words, sense, and meaning of the treaty.

Attorney General Legaré in his opinion professes to have disposed of the opinion of Attorney General Butler, which had been previously given in respect of this treaty of New Echota. The opinion of Attorney General Butler is of the 27th August, 1838, addressed to the Secretary of War.—(See vol. Opinions of Attorneys General, p. 1210.)

He says:

“The treaty provides that the claims arising under the treaty shall be examined and adjudicated by commissioners to be appointed by the President, by and with the advice and consent of the Senate, and that their decision shall be final. I am satisfied that all the opinions given in this office in respect to the claims, have been extra official and unauthorized; the Attorney General having no power to give an official opinion on the request of the head of a department, except on matters that concern the official powers and duties of such department. The character of the Cherokee board of commissioners is in principle the same with that of the boards appointed under the conventions with Spain, Naples, and France; and it was never supposed, in either of those cases, that the Attorney General could be called on, through the head of any department, to examine and discuss the various claims litigated before them,” &c.

In aid of the general principle of the inviolability of decisions of tribunals created by treaty declaring them final, and of the impropriety of the interference of the Executive to inquire into, or in any manner to revise or alter those decisions, we refer to two previous opinions given by the Attorneys General of the United States, in those early seasons of virtue when public functionaries were determined in spirit to do justice, and resolute against motives to warp their integrity.

The one is the opinion of Attorney General Breckenridge, December 24, 1805, on an award of the commissioners under the 7th article of the treaty of the United States and Great Britain of 1794—(Opinions of Attorneys General, vol. 1, p. 97.) The other of Attorney General Rodney, of July 22, 1807—(vol. of Opinions of Attorneys General, p. 106;) both addressed to the Secretary of State.

Mr. Breckenridge said: “This would be going into a re-examination of the matters referred to and decided on by the commissioners, of which, under the treaty, they had the exclusive and final jurisdiction.”

Mr. Rodney said: “The award is the legal and the statutable or conventional evidence for proving to whom the money must be paid. It is the instrument established by the treaty, and you cannot travel out of the record, which is final and conclusive as to the persons who are claimants; no power of appeal or review exists to correct errors or mistakes of the commissioners.”

By *the faith of treaties* is meant a sincere resolution, a firm constancy in fulfilling the engagements declared in a treaty. That faith is sacred and holy by the law of nations; it secures the peace and safety of nations. On the due observance and execution of treaties depends all the security which States and nations have with respect to each other. We can no longer depend on conventions to be made, if those that are made be not maintained and fulfilled. Nations have a right to unite to humble him who breaks his

treaties, and refuses to fulfil them upon pretensions ill-founded and frivolous.

That the decisions of the commissioners shall be final, and that "on their certificates of the amount due the several claimants, they shall be paid by the United States," are engagements by the United States expressly declared by the treaty. How is this stipulation fulfilled when the certificates of the commissioners are reviewed, reversed and annulled by the law officer of the United States? How is the faith due to the certificates observed, if the law officer of the United States may advise the accounting officers of the treasury that the commissioners have exceeded their jurisdiction? Of what value is a judgment without execution, or the means of getting payment? What is the dignity of a court, what confidence can be reposed in its decisions, of what worth are its judgments, if the agents and retained attorney of the defendant may commune with and instruct the judges secretly as to the decisions they shall make; and if, when made, they may be reviewed and annulled by the attorney of the defendant?

Expressions are thrown into the opinion of the Attorney General Legaré, which, coupled with the positive decision as made in the particular case, and with the overruling of the previous opinion of Attorney General Butler, had the effect to encourage the officer of Indian affairs and the Secretary of War to disrespect the decisions and certificates of the commissioners, and to withhold payment, as will be seen by the report of Mr. Foot, and the resolution thereon adopted by the Senate and House of Representatives, approved June 15, 1844. (See doc. 391, Mr. Foot's rep., 28th Cong. 1st sess.; Reports of Committees of House of Reps., 1843-44, vol. 2.)

The majority of the Committee on Indian Affairs made their report, (No. 391,) to sustain the grounds taken by the Executive department and the opinion of Attorney General Legaré, which was referred to and made a part of the report of the majority of the committee. The minority of the committee made a counter report, denying the right to review or reverse the decisions of the commissioners, commented upon the doctrine in the opinion of Attorney General Legaré, combatted that opinion by reason and authority, and reported a resolution ordering the Secretary of the Treasury to pay the certificates of the commissioners when presented. The report of the minority of the committee was sustained by the House, and the joint resolution before mentioned was passed and approved. (10th vol. Laws U. S., p. 659.)

By these proceedings the Congress disavowed the doctrine of review and reversal contained in the opinion of Attorney General Legaré, as used in the Department of War, and vindicated the honor of the United States and the faith of the treaty of New Echota.

Before this proceeding in 1844, the instructions issued by Mr. Harris, and by Mr. Crawford, were operating upon the commissioners; by the influence of the War Department, and by erroneous constructions of the treaties, wholly unknown to and withheld from the claimants, until dragged into light by successive resolutions of the one or the other of the houses of Congress.

Notwithstanding the reconsideration by the second board of commissioners of claims rejected was so strenuously forbidden, as before mentioned, yet, where such reconsiderations would favor the interests of the treasury of the United States, they were lawful enough, and within the jurisdiction of the commissioners. Accordingly, in the instructions of the Commissioner of Indian Affairs of 28th September, 1842, (Rep. 391, aforementioned)

tioned, p. 18,) he said, "Valuations of improvements appearing by the records of the former board, 'if you are not satisfied with their correctness,' are to be revalued."

As to claims under the 16th article of the treaty, the commissioners were instructed by the Commissioner of Indian Affairs as follows: "It is not supposed that any cases of this kind, deserving your favorable consideration, will be presented; but it is possible there may be." (See Rep. 391, aforementioned, p. 20; and again, p. 22.) "Claims under the 16th article, if any such should be preferred, it has been already stated, would not probably be entitled to your favorable consideration."

Here is a tampering; an instruction from the War Department to prepossess and prejudice the minds of the commissioners against a class of claims expressly provided for by the treaty. What are we to think of such a mode of administering justice under the treaty?

But again, (same page,) an act of Congress, appropriating \$50,000 to purchase certain lands in the State of Georgia reserved to the Indians by the treaties of 1817 and 1819, is alluded to, and the proceedings under it are mentioned. "It is presumed all those fairly entitled to its provisions applied under this law; and if they did not, that they were guilty of laches, which would operate in bar of their claims now." "All such should be very closely scrutinized; and if they might have availed themselves of the law of 1828, and did not do so, they ought not now to receive your decree in their favor."

A class of Indians within the State of Georgia who were dispossessed of their improvements and reserved lands, for which no grants had issued prior to the law of Georgia of December, 1833; for "regulating Indian occupancy," expressly provided for in the 16th article of the treaty of New Echota, are alluded to in the instruction before quoted, and the claimants are to be cut off from the indemnities promised by the treaty, by one or the other of two presumptions: 1. That they applied for the benefit of the appropriation by Congress in 1828 to buy their lands, and did sell to the agents of the United States. 2. If they did not, they are to be barred by laches and length of time.

The appropriation alluded to is by act of 9th of May, 1828, (Laws U. S., vol. 8, p. 45.) The President was to apply the appropriation of \$50,000 "to the extinguishment of the claims of the Cherokee Indians to all the lands which they occupy within the limits of the said State" of Georgia. If the United States bought their houses, improvements, and possessions, that affirmative should be proved by the United States. The Indians were not bound to prove they did not sell, being a negative incapable of being proved. They were neither bound to sell, nor to apply to the agents of the United States to try if a bargain and sale could be agreed upon; therefore no laches could be imputed to them. The instruction to the commissioners to presume a sale to the United States, or to presume laches, in bar of all such claims, was an outrage upon the rights of the claimants, and upon the faith of the treaty.

The commissioners were instructed by the Commissioner of Indian Affairs, (Rep. No. 391, p. 22,) that "claims which were taken under the treaties of 1817 and 1819, (according to opinion of the Attorney General of 14th May, 1839,) but which were on the land ceded in 1835, are entitled to no compensation for the *reservations*, because they were unauthorized, and should have been located on the cessions of 1817 and 1819."

The opinion referred to (volume of Opinions of Attorneys General, p. 1182) does give the construction to the treaty as stated by Mr. Crawford. But nevertheless, Mr. Attorney General and Mr. Commissioner of Indian Affairs are both wrong as to the reservations under the treaty of 1817.

The 8th article of that treaty expressly allows the reservations "on the lands that are *now*, or *that may hereafter be*, surrendered to the United States." The treaty of 1819 confines reservations to the lands ceded by that treaty.

This erroneous instruction has been the source of difficulty and improper rejection of claims; and is an example, among many others, to prove the impropriety of the course of trying the rights of individuals by opinions made up in an executive chamber, where the individuals to be affected are unheard, and have no opportunity to defend their rights. The treaty of New Echota established a court of commissioners, wherein business ought to have been conducted openly; where the interpretations of the treaties might have been examined and discussed by both parties, so as to arrive at their true sense and meaning, so essential to the due administration of justice. The condemnation of whole classes of private rights and interests under the treaties, by such secret interpretations and destructive extra-official opinions, and mandatory instructions, sent to the judges and concealed from the claimants, was an innovation and assumption at war with the principles of natural justice, and in scorn of the Divine example set us, in not pronouncing against Adam unheard.

The Commissioner of Indian Affairs instructed the commissioners, (report No. 391, aforesaid, p. 20,) "There are no pre-emption rights; they were provided for by the 12th article of the original treaty, but abrogated by the first of the supplemental articles, and never had more than an inchoate existence, which is gone."

The rights of pre-emptions of the lands were parts and portions of the inducements and considerations of the treaty as concluded and signed on the 29th December, 1835, whereby the Cherokees ceded their lands to the United States.

The 12th article relates to "those individuals and heads of families of the Cherokee nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the United States," &c. The treaty distinguishes these into two classes: 1st, those then residing in the States of North Carolina, Tennessee and Alabama; 2d, those who then resided in the State of Georgia, but were willing to remove out of Georgia and settle in North Carolina, Tennessee, or Alabama.

To the first class, pre-emptions are given of 160 acres, or one quarter section of land, to each head of an Indian family, to include their present buildings or improvements. But to the second class, their pre-emptions were not to be taken in Georgia to include their buildings and improvements in that State, but they were to remove into North Carolina, Tennessee, or Alabama; and therefore they were allowed the pre-emption of 160 acres of land to each head of an Indian family, to be located within two years, in either of those three States.

The United States being under an express contract with Georgia respecting the extinguishment of the Indian title to lands within the State of Georgia, and for the benefit of that State, were not willing to let the Indians living in Georgia retain their buildings and improvements, with one

hundred and sixty acres around them, in that State; but such were to remove from Georgia, and locate their pre-emptions in one of those other States.

Hence the distinction between the two classes: the one class of pre-emptioners confined and located, to include their existing buildings and improvements; the other class unlocated, but to be located within two years.

These settlers and improvers had, by the laws of nature, of nations, the acknowledgment of the United States, and by the laws and usages of the Cherokees, vested rights to their buildings and improvements, and rights of perpetual occupancy of the soil, which was of the common domain of the Cherokee nation at and before the treaty of New Echota was concluded and signed, in December, 1835.

By this treaty of December these settlers and improvers, in common with the other Cherokees, surrendered their common property in the Cherokee country to the United States, reserving to these settlers and improvers, respectively, these private rights and interests of their buildings and improvements, with the pre-emption of 160 acres of land around them. To this the parties to the treaty were consenting; it was one of the considerations and inducements to the treaty of New Echota of December, 1835.

These Indians had private interests in their buildings and improvements before the treaty; and by the treaty, when concluded and signed, they acquired additional and more extensive interests in the fee simple as pre-emptioners. These rights of pre-emption were incipient; they were *inchoate* rights—that is, rights begun, existing—for such is the meaning, in the legal sense as well as in the popular sense. The word “inchoate” signifies begun, commenced. In law there are equitable rights, or rights begun, existing, but requiring something to be done to complete and perfect them into legal titles. Inchoate rights are property, respected by the law, protected by the law: they are the subjects of agreements and sales; good considerations to support assumpsits. The idea that an inchoate right is no right at all, and therefore not to be paid for if taken away, not to be compensated if annulled to suit the policy of government, is a novelty in jurisprudence; and it may be that the Commissioner of Indian Affairs had some such idea floating in his brain when, in June, 1838, he instructed the commissioners that no payment should be made for reservations under the treaties of 1817 and 1819.

When the President signified his determination not to allow any pre-emptions and reservations, and his desire that the whole Cherokee people should remove west, and a negotiation was set on foot to annul these pre-emptions and reservations, they became the very subjects of the renewed negotiation, for which an equivalent should be offered by the United States. These pre-emptioners and reservees, whose rights and interests were to be annulled, were entitled, by the same principles of natural justice, by the same considerations of their private rights in their buildings and improvements which had induced the 12th article of the treaty of December, 1835, to have in the new treaty to abolish their rights an equivalent compensation therefor. The constitutions, State and federal, have sanctified the principle that private rights shall not be taken for public use without just compensation. This principle of justice pre-existed; it was a dictate of right reason, immutable and eternal. Being so, the constitution of the United States has declared and ordained it as sacred, not to be violated.

Accordingly, when the first supplemental article abolished these pre-emptions and reservations, the third supplemental article provided a compensation.

A sum of money is allowed "in lieu of the said reservations and pre-emptions," which "shall be applied and distributed agreeable to the provisions of the said treaty." The said reservations and pre-emptions spoken of in the third supplemental article, are those abolished by the first supplemental article; and that first supplemental article says, "It is therefore" (because of the President's determination and desire as aforesaid expressed) "agreed that all the pre-emption rights and reservations provided for in articles 12 and 13 shall be, and are hereby, relinquished and declared void." In the third article of the supplement the participle "said," (aforesaid) prefixed to reservations and pre-emptions, relates to the next antecedent, the reservations and pre-emptions mentioned in the first supplemental article, which are those mentioned in the 12th and 13th articles, and which by the said first article of the supplement are "relinquished" and declared void.

These pre-emption rights had existence, they had begun, they were "relinquished," by article one of the supplement, in consideration of the 3d article of the supplement particularly, and of all the other articles in general. To make an interpretation of the 1st article of the supplement by itself, and, because the pre-emptions are thereby relinquished, that no compensation shall be allowed for them, is contrary to the axioms 8 and 9. The articles in the original treaty and in the supplemental treaty are all to be taken together as one whole; and the meaning and effect of any one article are to be collected and explained by others.

The Commissioner of Indian Affairs instructed the commissioners that reservations were to be paid for, but not pre-emptions. Why not pre-emptions? He says "there are no pre-emption rights; they were provided for by the 12th article of the original treaty, but abrogated by the 1st of the supplemental articles." So were reservations abrogated, and "relinquished and declared void," by that same article 1. But pre-emptions, he says, "never had more than an inchoate existence, which is gone." An inchoate existence is not a nullity, is not a nonentity. An "inchoate existence" is a begun existence, a commenced existence. As such it was capable to be transferred, assigned, sold, and relinquished. These pre-emptions so having an "inchoate existence," an existence begun, were sold and "relinquished," by the 1st supplemental article, to the United States, in consideration of the money mentioned in the 3d supplemental article, together with the considerations mentioned in all the other articles in the original and the supplemental treaty, according to axiom 11, before stated.

After the opinion of Attorney General Legaré before noticed, the certificates of the commissioners were disrespected at the War Department. The claimants applied, by a memorial, to the Congress for relief. Of these doings a history is given in the report No. 391, 28th Congress, 1st session, House of Representatives, before mentioned. To that history we refer for the spirit of opposition made to the claims under the treaty of New Echota by the Commissioner of Indian Affairs and the Secretary of War, under the specious pretext of reviewing the decisions of the commissioners "for the single purpose of ascertaining whether the commission had jurisdiction," and by the "*inherent* power which is necessary to discharge an



imposed duty, unless prohibited by law;" (as if the treaty of New Echota with the Cherokees was no law or rule of conduct for the War Department.)

This power claimed, with the examples, to review the proceedings and facts in the case "for the single purpose of ascertaining whether the commission had jurisdiction—if it had not, its acts are void," brings to mind the fable of the pigs who were well secured in their house, with warning by the mother not to open the door until she returned. In the meantime the fox entreated the pigs to be pleased to open the door, only so much as to let him put one foot in to be warmed; after the fox had one foot in, he thrust his whole body in, and devoured the confiding pigs.

Messrs. Eaton and Hubley, the commissioners, were removed from office by the President on the 17th January, 1844.—(See the letter of J. M. Porter, Secretary of War, to T. H. Crawford, Commissioner of Indian Affairs; Senate doc. No. 113, p. 15, 29th Congress, 2d sess., printed by order of the Senate, February 3, 1847.)

From this dismissal the commission was vacant until June, 1844, when Messrs. Mason and Washington were commissioned for one year, or during the pleasure of the President. From June, 1845, the commission was vacant until July 22, 1846; then Messrs. Harden and Brewster were commissioned for one year, or during the pleasure of the President; their commissions have expired, and the commission is now vacant.

Before these last commissioners commenced their sessions, the Commissioner of Indian Affairs (Mr. Medill) issued his instructions to them in a letter dated "War Department, Office Indian Affairs, August 27, 1846." (Senate doc. No. 113, 29th Congress, 2d session; printed February 3, 1847.)

In this letter of Mr. Medill, Commissioner of Indian Affairs, the poison of former instructions is contained, by reference to them, with a quintessence distilled by himself.

Mr. Medill says: "The accompanying copy of a communication to Messrs. Carroll and Lumpkin of 1836, a copy of a communication from this office to the second board of 28th September, 1842, to be found in House report No. 391, 28th Congress, 1st session, pp. 17 to 24, and the enclosed copy of a letter of my predecessor of 20th June, 1844, to the third commission, embody the views of the department, at the respective dates, respecting the various classes of claims arising under the Cherokee treaty of 1835-'36.

"Those views may be modified in some degree by the provision of the treaty recently made between the United States and the Cherokees; but as the law making provision for the organization of the present commission provides for the reference of any case to the Attorney General, in which you may differ in opinion, it is not regarded by the department as necessary to give you *special instructions* in the premises.

"I refer you, however, to the House document above named, at page 58, for an opinion of Attorney General Legaré respecting the *jurisdiction* of the commission, and the duties of the executive officers in regard to the decisions of said board, and suggest that you fully and freely advise with this department on the several matters committed to you.

"In view of the modification of certain parts of the treaty of 1835-'36 by that just ratified, and of the change consequent thereupon, it is deemed advisable by this department that no certificates be issued by your commis-

sion on the decrees that you may make, until you shall be informed by it that there is money in the treasury applicable to their payment."

The compensation to be allowed them is there treated of as contingent upon a ratio between the commissioners and their secretary, after deducting the contingent expenses of the board from the appropriation of \$7,000.

From this letter, and the instructions previously issued from the office of the Department of War, through the Commissioner of Indian Affairs, to the commissioners appointed successively under the seventeenth article of the treaty of New Echota, it appears that this court of commissioners, instituted by the two contracting powers, has been treated and used from the beginning, by the Commissioner of Indian Affairs, as an instrument, subject to orders and instructions; that the commissioners of the treaty were kept in the leading-strings of the War Department. To destroy the independency of the court of commissioners, their tenure of office has been throughout "during the pleasure of the President," as expressed in their commissions, made out and recorded in the Department of War; and the first board was dissolved by order of the Commissioner of Indian Affairs of the 17th January, 1839, before referred to; and the second board was dissolved by the removal of the commissioners from office by the letter of J. M. Porter, Secretary of War, of the 17th January, 1844.—(Senate doc. No. 113, 29th Congress, 2d sess., p. 15.)

By the constitution of the United States, article 6th, "all treaties made or to be made under the authority of the United States shall be the supreme law of the land." By art. 3, sec. 2, the judicial power of the United States extends to all cases arising under the constitution and treaties made or which shall be made under their authority; by the treaty of New Echota a high judicial tribunal, of transcendent and final jurisdiction, is established to examine and adjudicate all claims arising under the treaty, against the United States; by the treaty, the judges who are so to examine and finally adjudicate are to be appointed by the President, by and with the advice and consent of the Senate of the United States; by art. 3, sec. 1, of the constitution, "the judges both of the supreme and inferior courts shall hold their offices during good behaviour, and shall receive for their services a compensation which shall not be diminished during their continuance in office." According to the spirit of the constitution of the United States, according to the meaning, spirit, and faith of the treaty of New Echota, by the reason of the case, the judges of the high court of commission instituted by that treaty ought to have been commissioned otherwise than at the pleasure of the President of the United States. But the fact that the commissions were so issued did not justify the arbitrary power assumed by the Commissioner of Indian Affairs over the commissioners and their duties, and over the treaty. By this letter of the 27th August, 1846, to the commissioners, Messrs. Harden and Brewster, they were put under instructions and in the service of the Department of War, as clay in the hands of the potter, to be moulded to the purposes of the department.

The same unfaithful interpretations of the treaty, the same restrictions upon the powers of the court of commissioners, which have been heretofore commented upon, were reiterated by Mr. Medill; the same power to revise and annul their decisions, which had been the subjects of examination and animadversion in the report of Mr. Foot, in the Congress, in 1844, and which had been disavowed by the joint resolution reported from the com-

mittee by Mr. Foot, adopted by the Senate and House of Representatives, and approved by the President, before referred to, is again assumed by this letter of Mr. Medill as Commissioner of Indian Affairs, with these aggravations, that the commissioners are instructed that "you fully and freely advise with this department on the several matters committed to you;" and "that no certificates be issued by your commission on the decrees you may make until you shall be informed by it that there is money in the treasury applicable to their payment."

Is this the high court of commissioners provided for by the two contracting nations, by which all claims under the treaty were to be examined and adjudicated? whose decisions were to be final; whose certificates were to be paid by the United States? Do such instructions, such communications, to the commissioners appointed under the treaty, comport with the office and character of judges, or the independence of a judicial tribunal? Do they befit the honor and dignity and good faith of the United States? Do they consist with the faith of the treaty? They are condemned by the axioms 1, 3, 12, 13, 14, and 15, before cited.

There is no difference in the injury to the Cherokees, whether these wrongs were committed by the blundering ignorance of a Commissioner of Indian Affairs, or impudently, knowingly, and wilfully, from a selfish view (as mistaken as it is low minded and shortsighted) of commending himself to favor for having saved some dollars to the public treasury at the expense of the honor of the United States, and in breach of the faith of a treaty with a power too weak and dependent to seek redress by reprisals.

The injury to the Cherokees might have been less, if these instructions had not been secreted from them and their counsel until the mischief had been accomplished.

Neither the report of Mr. Foot, of the Committee on Indian Affairs of the House of Representatives, nor the joint resolution of the Senate and House of Representatives, approved by the President of the United States, of the 15th June, 1844, nor the moral perceptions of the Commissioner of Indian Affairs, could confine him within the border of his official duties, nor restrain him from issuing to Messrs. Harden and Brewster, the commissioners under the treaty of New Echota, the very improper and gross instructions contained in his letter of August 27, 1846.

The previous instructions therein referred to have been noticed, and their errors and improprieties pointed out. In these instructions of Mr. Medill, the former instructions that the claims passed upon by a former board are not within the jurisdiction of the existing commission, together with the opinion of Mr. Legaré on that subject, and the alleged duties "of the executive officers in regard to the decisions of the said board," (that is, to revise and annul them on the principles expressed in Mr. Legaré's opinion,) are particularly noted and reiterated.

The design of this instruction was to fasten upon the claimants the rejections caused by the previous erroneous instructions; decisions so palpably erroneous in matters not susceptible of doubt, as that their correction by any court having justice in view would inevitably follow, unless the commissioners should be prevented by an instruction that such claims as were passed upon by a former board were not within the jurisdiction of the existing commission.

Why not have referred to the refutation of Mr. Legaré's opinion, contained in the report of Mr. Foot, sustained by the House and by the Sen-

ate, and by the passage of the joint resolution of the Congress? Was it fair to point to the error, and to omit to notice the refutation; to administer the poison and omit to mention the antidote? Do these instructions of Mr. Medill to Messrs. Harden and Brewster comport with a spirit and desire to administer justice fairly and impartially? Do they comport with a decent respect for the joint resolution of 15th of June, 1844, with that obedience to the law which becomes a public officer? Do they exhibit respect for the court of commissioners established by the treaty? or an intention to suffer the treaty to be fulfilled in honesty and good faith? or that regard for the good faith of the United States, and of the obligation of the laws, which should be observed by a public officer of the United States? Do they not bear internal evidence of an arbitrary will, and of the absence of some of the qualifications essential to a Commissioner of Indian Affairs, the want of which freezes the generous confidence of a people and turns it into apprehension and fear? To these questions the Congress and President of the United States may respond; to propound them is the painful duty of your memorialists.

The first reading of the instruction not to issue certificates until informed by the department "that there is money in the treasury applicable to their payment," would leave the impression that there was a failure of appropriation by Congress to that object. The truth is otherwise.

The Congress by act of 2d July, 1836, appropriated four million five hundred thousand dollars, according to the effect of the first and second articles of the treaty of New Echota of 1835-'6.

Also, in the same act, the further sum of \$600,000 was appropriated to pay for removals and spoiliations, according to the third supplemental article; and by the act of 12th June, 1838, the further sum of \$1,047,067 was appropriated "for all objects specified in the third" supplemental article, and for aiding the subsistence of the Indians after their removal west. (See 9th vol. Laws U S., pages 453 and 778—edition by Clerk of House of Representatives.)

The books of the Treasury Department show that those appropriations were not exhausted by payments to the objects of appropriations, neither at the date of Mr. Medill's letter, nor when the commission expired in July, 1847, and that they are not now exhausted. Neither were the appropriations for the objects of the third supplemental article exhausted by payments to the objects of appropriation at the date of Mr. Medill's letter to the commissioners, nor are they now exhausted. As to the treaty of Washington then lately concluded, bearing date August 6, 1846, there is nothing in it to arrest, or in any manner to impede, the examinations and adjudications by the commissioners under the treaty of 1835-'36, or to divert the appropriations which had been theretofore made by the Congress from the objects for which they had been so made. An account in full of the whole sum of \$6,647,067 was thereby promised the Cherokees, but that account and settlement was to be credited by all sums which had been, "or may be hereafter, properly allowed and paid under the treaty of 1835;" and by the tenth article it was explicitly declared that the rights and claims which the Cherokees then residing in the States east of the river Mississippi had, or may have, shall not thereby be in any manner taken away or abridged.

Why, then, refer to the treaty then lately executed as an excuse for the instruction to the commissioners not to issue certificates until informed by

the department "that there was money in the treasury applicable to their payment?" The mere account promised by that treaty recently made has nothing startling in it to the department, unless the specific appropriations for the objects mentioned had been misapplied or wasted, or diverted from the specific objects of the appropriations. Did the Commissioner of Indian Affairs intend by his words to insinuate that the appropriations aforementioned had been wasted or misapplied?

But if such misapplication or waste had been committed, the Cherokee claimants ought not to have been delayed or hindered in obtaining their certificates, the evidences of their demands, by any such misconduct of the officers of the United States.

Whether there was or was not money in the treasury applicable to the payment of the certificates of the commissioners, was a question which had no connexion with their duties; they did not pay them, nor look after their payment. That belonged to the duties of the Secretary of the Treasury under the joint resolution of the two Houses of the Congress, approved June 15, 1844. The claimants were entitled to their certificates upon adjudications in their favor. If presented at the treasury for payment, the Secretary of the Treasury had the power and the will to cause them to be paid. If the appropriations for that object had been misapplied and diverted to other objects, or wasted, it was the duty of the Secretary to look into that matter; the claimants could not. If the certificates when presented were not paid, the claimants having the certificates could apply to the Congress, as they had been compelled to do before. The claimants in applying to the Congress for redress would not apply in vain. When the holders of the certificates of the commissioners had asked the Congress for their bread, that department of the government had not given them a stone.

When the true state of the facts are looked to, when it is considered the state of the treasury cannot alter the treaty, nor curtail the jurisdiction, powers and duties of the court of commissioners, the allusion to the late treaty and the state of the treasury turns out to be an artful use of equivocal language to avoid a direct and positive assertion of that which was untrue, and yet give a gloss for the instruction not to issue certificates until informed by the War Department as to the state of the treasury.

By this instruction against issuing certificates until informed by the Department of War "that there is money in the treasury applicable to their payment," (a matter belonging properly to the Department of the Treasury,) united with the other instruction to the commissioners, "that you advise fully and freely with this department on the several matters committed to you," the power is retained to the War Department to revise, alter and control the decisions of the commissioners at the pleasure of that department, as being colorably the acts of the commissioners themselves. That department did not desire again to adventure so far as of itself, and by its own "power inherent," to revise and annul the decisions of the commissioners after the certificates had issued to the several claimants. The joint resolution of June 15, 1844, would stand in the way of such after revisal and annulling. The holders of the certificates would then have the law, the rule of conduct prescribed by that joint resolution, on their side, in opposition to the conduct of the War Department in attempting to refuse payment of the certificates in the hands of the holders.

These instructions taken together, or singly, were in their design and effects arbitrary assumptions of power, unwarrantable interferences with

the duties of the court of commissioners established by the treaty, a hindrance and delay to the claimants, and a breach of good faith, against which, and against all similar acts in future, the claimants under the treaty have a right to expect protection from the government of the United States.

By the reason of the case, by necessary implication and consequence of the treaty, the court of commissioners should have been independent of the will and pleasure of the President of the United States. By like reason and implication, and the settled opinions of mankind respecting the administration of justice by a judicial tribunal, the proceedings of the court of commissioners should have been open and public, with the benefit of counsel to the claimants, (who were of themselves not qualified to manage their claims before the court;) they had a right to hear the objections made to their claims, and to combat the objections. The conducting of the business in conclave, and by private instructions and advisements between the Commissioner of Indian Affairs or the Secretary of War and the court of commissioners, was an outrage upon the treaty and a mockery of justice.

By these secret doings, the faith of the treaty, its meaning, soul and spirit, and the dignity of the court of the treaty, have been wounded and insulted as deeply as the spirit of the constitution of the United States would be, if the President of the United States should, in cases in which the United States was party defendant in the Supreme Court of the United States, send his instructions to the justices of that court as to the decisions they should give, directing them not to grant rehearings, nor rearguments, nor to take cognizance to review cases which had been adjudged in favor of the United States, nor to issue execution until advised so to do by the President, and instructing the justices to advise fully and freely with him respecting the matters pending before them.

Fortunately for the citizens of the United States, the judges of the courts of the Union hold their offices during good behavior; the President cannot remove them at his pleasure; their salaries are fixed, and cannot be taken from them during their good behavior, nor diminished. Fortunately for the people of the United States, the moral sense of the President would not allow him to make such communications to the justices of that august tribunal, and his common sense teaches that such an offence would meet with merited contempt, disgrace and punishment.

Unfortunately for the Cherokees, the moral sense of the Commissioner of Indian Affairs, for three successions, did not shrink from plying the commissioners successively appointed under the treaty of New Echota with instructions and directions, and erroneous interpretations, in violation of the treaty, to the grievous injury of the claimants and in disregard of the good faith of the United States. Most unhappily for the Cherokees, the commissioners, the judges of the court instituted by the treaty of New Echota, have been commissioned to hold their offices at the pleasure of the President of the United States, and have been made to understand and believe that their continuance in the enjoyment of the emoluments of their offices depended upon their obedience to the instructions so issued by the Commissioner of Indian Affairs.

The good Book instructs us, "Where a man's treasure is, there his heart will be also." Man is frail, and liable to fall if placed in the way of temptation. And though those are criminal who do not withstand the temptation, neither are those innocent who lay the bait in their way. For the honor of human nature, there are men firm and resolved in the right, inflex-

ible to ills, and obstinately just. That such are comparatively so few, the Cherokee claimants under the treaty of New Echota have abundant cause to lament.

Instructions issued under the seeming authority of the War Department are imposing, although the authority in the particular case has been exercised in contravention of law and in violation of the faith of a treaty. But when those over whom such illegal authority has been exercised stood as guardians and protectors of the rights of others, and have tamely submitted because their intellect or their moral sense was obtuse, and their love of place and emoluments of office was more acute, and when those whose rights have been trampled upon by such usurpation could not resist because they had no knowledge of it until the designed mischief was accomplished, the government, whose officers have under color of its authority and in its name so abused their places and done injuries to individuals, is bound to vindicate its honor, justice, and public faith, by redressing the injuries.

The written interpretations of the treaty, and the written instructions given to the court of commissioners by the Commissioner of Indian Affairs which were secreted from the claimants, have at length, by the authority of the Congress, been drawn forth, piecemeal, from the recesses of the bureau of Indian affairs, and published; but of the unwritten versions of the treaty and unwritten instructions (now attempted to be excused under the name of suggestions, as if names could alter the substance and essence of things) which were imposed upon the court of commissioners in the various advisements "fully and freely" held from time to time with the War Department, we know nothing except by the outcomings.

Of these advisements imposed by the department on the court of commissioners, the most prominent arise out of the constructions of the treaties of 1817 and 1819, by which forfeitures for removals are worked. These forfeitures are extended to the fee simple of the children, for the offences of the heads of Indian families who owned only a life estate. In the rage for forfeitures, whereby to increase the quantity of lands ceded by the Cherokees, and to decrease the payments by the United States to the Cherokees, no regard is paid to the legislative acts of the several States to appropriate the lands reserved to the Cherokees within the borders of those States, respectively, to the public domain of the States, and to sell it out as such, nor to the public history of the proceedings under those laws; inasmuch, that the Indians, instead of being confronted by evidence to fix upon them a voluntary removal and abandonment of their reservations, are subjected to forfeitures by presumption, unless they can repel the presumption by proof of an expulsion by force of arms. A private sale by an Indian head of a family, owning but an estate for life, is made to bar the fee simple remainder of the children; notwithstanding the twelfth section of the act of Congress of the 30th March, 1802, (vol. 3, p. 463, Bioren's edition,) had prohibited any purchase, grant, or conveyance of land from any Indian within the bounds of the United States, and declared any such purchase void "unless made by treaty or convention entered into pursuant to the constitution."

The Cherokees insist that the removals prohibited by the treaty of 1817 were removals from the east side of the river Mississippi, westward to the Cherokee country on the Arkansas river; that the prohibition was temporary, and ceased by the treaty of 1819. The claimants of reservations in-

sist that the estate in remainder in fee to the children could not be forfeited, sold, conveyed, or defeated, after the treaty of 1819, by any act of the owner of the lesser estate for life.

These questions have been raised in the War Department, decided in favor of the government, without opportunity to the Cherokee claimants to be heard in defence of their rights, and imposed by the department on the commissioners as dogmas, to be rules of their decisions, under the penalty of dismissal from office hanging in terrorem over their heads. Against such back stairs influence exerted by the War Department, against such interpretations of the treaties, the Cherokee claimants do solemnly protest, and appeal to the justice and good faith of the government of the United States.

The preamble to the treaty of 1817 explains the reason and scheme of the treaty. The Cherokee nation had agreed to divide into two nations the Cherokees east of the river Mississippi, and the Cherokees west of that river, on the Arkansas, and to divide their lands east of the Mississippi, and their annuities, between the two parts, in proportion to the numbers of those who remained east and those who had gone and who should remove west; the proportion of the lands east of the Mississippi belonging to the Cherokees west and who should remove west to be ceded to the United States, in exchange for lands of the United States on Arkansas. The preamble explains what was meant by removing. It speaks of the part of the Cherokee nation west, "including, with those now on the Arkansas, those who are about to *remove thither*." Here is a clear and distinct explanation of the *removal* spoken of in the articles of the treaty.

The 1st and 2d articles cede to the United States two tracts of country, by defined boundaries, as part of the portion of the lands assigned to the Cherokees west and who intended to remove west; the additional quantity of lands to be allotted to the Cherokees west and who desired to remove west, and to be ceded to the United States, was to have been ascertained and proportioned according to a census of the Cherokees east and west; and the 3d article stipulates "that a census shall be taken of the whole Cherokee nation during the month of June, 1818." "The census of those on the east side of the Mississippi river" was to have been taken by a commissioner "appointed by the President of the United States, and a commissioner appointed by the Cherokees on the Arkansas river; and the census of the Cherokees on the Arkansas river and those *removing* there, and who at that time declare their intention of *removing* there, shall be taken by a commissioner appointed by the President of the United States, and one appointed by the Cherokees east of the Mississippi river." In this, what is meant by removing is clearly seen to be a removal from the east side of the Mississippi to Arkansas.

The 4th article declares that the annuities to the Cherokees shall be divided and apportioned between the two parts of the nation "in proportion to their numbers, agreeable to the stipulations in the third article of this treaty; and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeable to their numbers, to which those who *have removed*, and who declare their *intention to remove*, have a just right, including these with the lands ceded in the first and second articles of this treaty." Here again is a clear explanation of what is meant by removing. It is a removal from the east side of the Mississippi to Arkansas.



Article 5 stipulates that the United States shall, for the lands ceded in the first and second articles, and which they may thereafter receive as the portion of that part of the Cherokee nation on the Arkansas, give as much lands, acre for acre, in exchange, on the Arkansas and White rivers, "as the just proportion due that part of the nation on the Arkansas, agreeable to their numbers."

Article 6 stipulates that the United States shall pay "all the poor warriors who may *remove* to the western side of the Mississippi river," to each a rifle, ammunition, a blanket, brass kettle, or in lieu of the kettle a beaver trap, "as a full compensation for the improvements they may leave;" "and to those emigrants whose improvements add real value to their lands, the United States agree to pay a full valuation for the same, to be ascertained," &c.

Article 7 stipulates that the United States shall pay "for all improvements which add real value to the lands lying within the boundaries ceded by the first and second articles," to be valued as in the preceding article; "or, in lieu thereof, to give in exchange improvements of equal value, which the emigrants may leave, and for which they are to receive pay;" and that "all these improvements left by the emigrants within the bounds of the Cherokee nation east of the Mississippi river, which add real value to the lands, and for which the United States shall give a consideration, and not so exchanged, shall be rented to the Indians by the agent, year after year, for the benefit of the poor and decrepit of that part of the nation east of the Mississippi river, until surrendered by the nation, or to the nation;" "that the said Cherokee nation shall not be called upon for any part of the consideration paid for said improvements at any future period." In all these articles the meaning of removing is clearly seen to be, a removal from the east side of the Mississippi river to the west, on the Arkansas.

By article 8 it is stipulated, that to each and every head of an Indian family residing on the east side of the Mississippi river, on the "lands that are now or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of six hundred and forty acres of land, in a square, to include their improvements, which are to be as near the centre of a square as practicable, in which they will have a life estate, with a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty: Provided, That if any of the heads of families, for whom reservations may be made, should remove therefrom, then and in that case the right to revert to the United States. And provided further, That the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty."

There is no good cause for affixing to the removals spoken of in this article a sense different from the removals spoken of in all the former articles; on the contrary, there are cogent reasons for giving them the same sense and meaning.

A removal of a family *from* one place necessarily implies a removal *to* another place. That place to which the removal in this eighth article alludes, is to the Indian nation west, on the Arkansas. Such are the re-

movals treated of in the preceding articles; and, according to axiom 8th, they shall explain the meaning of the eighth article. The uniform, steady train of thought throughout the third, fourth, fifth, sixth, seventh, and eighth articles, relates to the division to be made between the eastern and the western Cherokees; between those of the Cherokees east of the Mississippi and those west on the Arkansas, and those to remove *from* the east side of the Mississippi *to* Arkansas. Such removing from the eastern nation to the western, on the Arkansas, is the burden of the treaty; the concern of the census; the regulator of the exchange of lands; the index to the improvements which the United States were to pay for; the numerator and denominator of the division between the eastern and western Cherokees, and between the United States and the Cherokees, east and west.

The proviso forbidding removal immediately succeeds the declaration that the register for reservations shall be kept open until the census is taken according to the third article, and that census relates to and is to include those who shall remove to Arkansas, with those who were already there. The proviso has a direct and close connexion with removals to Arkansas, and to the census to be taken of those who should be found there. The proviso upon the proviso, which follows the forfeiture for removals from the reservations, declares the reservations shall be deducted from the lands ceded by the Cherokees to the United States by the first and second articles, which shows that the forfeiture for removing from reservations is connected with and a part of the system for regulating how much land the Cherokees then at Arkansas, and who should remove there, should have for their portion, and consequently how much the whole nation were to cede to the United States in addition to that ceded by the first and second articles. Removal to Arkansas was the important subject, wherein the eastern Cherokees, the western Cherokees, and the United States were severally interested.

There is a uniform, steady train of thought in this 8th article, connecting the census of the third article, the cession to the United States of lands east of the Mississippi, to be apportioned by that census according to the 4th article, and to be paid for by the United States by lands on the Arkansas in exchange, acre for acre, according to the 5th article, and a deduction of the reservations, according to this 8th article, from the quantity chargeable to the United States of lands east of the Mississippi, to be paid for in lands on the Arkansas. The removal of Indian families so treated of in the 8th article is a mixed mode, a concrete term of expression, uniting in the mind several ideas into one combination of thought, including the census of the Cherokees on the Arkansas, and those who shall remove there, the time of removal, so as to be found at Arkansas when the census shall be taken, the apportionment of lands east of the Mississippi, the lands to be given in exchange on Arkansas, and the deductions therefrom of the quantity of the reservations not to be charged to the United States, and not to be paid for as any part of the cession to the United States. All these several and distinct ideas of time, place, and circumstance, are blended and combined in the manner of the giving of reservations and the proviso, and the proviso upon the proviso. Removal of a family is, in itself, a complex idea, a mixed mode, including an abandoning of a habitation at one place, the making of a habitation at another place, with the time between the removal from the one place to the setting down at the place removed to. The place to be abandoned and removed

from is the Cherokee country, and land east of the Mississippi river; the place to be removed to is the Cherokee nation on the Arkansas river; the time of such removal is after registering for reservations and before the census should be taken of the Cherokees in the country on the Arkansas river. To introduce any other place and any other time as being applicable to the removals interdicted, would break the uniform, steady train of thought, and bring in unreasonable restrictions.

If, after families were registered on the east side of the Mississippi for reservations, the same families should remove to the western nation of Cherokees on the Arkansas before the census was taken and completed, and thereby become enumerated with the western Cherokees, the ratio of the apportionment of the lands east of the Mississippi, between the Cherokees east and the Cherokees west, as well as the apportionment of the annuity agreed to be made by the 4th article, would have been deranged; and the cession of the lands to the United States as the portion of the western Cherokees, and the quantity of lands to be given by the United States on Arkansas river, in exchange therefor, would have been disturbed and disarranged.

Such registration for reservations, deducted from the lands ceded by the 1st and 2d articles, diminished the quantity left, which the United States were to pay for, and the removals of those same families to Arkansas *before* the census was there completed would have swelled the numbers of the Cherokees on Arkansas in the census there taken; whereby the portion of the western Cherokees on Arkansas would have been increased, and the portion of the Cherokee nation east of the Mississippi would have been decreased. Moreover, those registering for reservations, and thereafter removing west to Arkansas before the census of the Cherokees was there completed, if permitted, notwithstanding such removal, to retain their reservations, would have received not only those reservations, but their common interest in the public domain of the western nation of Cherokees, increased by their removal to Arkansas. The injustice to the eastern Cherokees would have been increased by such removals to Arkansas, after registration for reservations, and before the census, if such families so removing had been permitted to retain their reservations; first, because the reservations were to be deducted out of the quantity ceded by the 1st and 2d articles of the treaty of 1817, and the eastern Cherokees would have been bound to make a further cession to the United States, consequent upon the increased number of the Cherokees on Arkansas accrued upon such removals before the census.

It is worthy of notice that the treaty of 1817 was concluded and signed on the 8th of July, 1817, and ratified 26th of December, 1817, affording time and opportunity to file their names with the agent of the United States, as electing to take reservations, and thereafter to remove to Arkansas before the census appointed for the month of June, 1818, which time for the census was kept open until the treaty of 27th of February, 1819, and then finally dispensed with, and the time to take reservations prolonged until the end of the year 1819 by the 7th article of that treaty.

To prohibit removals from the east side of the Mississippi to Arkansas after registration for reservations, and before the apportionment of the lands and annuities was finally adjusted, and to inflict the penalty of forfeiture of the right upon such premature removals, was reasonable and proper, so that such persons so registering for reservations should not re-

ceive double portions, one on the east of the Mississippi and another in the common property of the lands on Arkansas, and to the end that the forfeited reservations should not in the final adjustment be deducted from the quantity ceded to the United States by articles 1 and 2 of the treaty of 1817.

The removal of Indian families from one part of the Cherokee country, on the east side of the Mississippi, to another part of the same eastern territory, from improvements in the territory east of the Mississippi to other lands and improvements in the eastern country, before the census, would not disturb nor derange the contemplated apportionment according to the ratio to be ascertained by the census of the Cherokees east and the census of the Cherokees west. Those who registered for reservations, and who remained in the country east until after the final apportionment and adjustment, would not have increased the census of the Cherokees on Arkansas—would not have received double portions. No matter how they removed from one place to another place in the Cherokee country after registration for reservations, they were yet eastern Cherokees and not western Cherokees.

It was a removal from the east side of the Mississippi after registration for reservations to the west on Arkansas, before the time appointed for the census; before the apportionment and adjustment between the three parties, the United States, the Cherokees east, and the Cherokees west, which tended to derange the ratio of apportionment and adjustment of the interests of the three several parties. That was the manner of removal, as to time, place, and circumstance, which was within the reason of the forfeiture. Such is the meaning of removing, as explained by the several articles of the treaty, and by the sense and meaning of the treaty, taking all the parts together as one whole.

Such removal before the census, or before the final adjustment substituted for it, which forfeited the right to the reservation, and which forfeiture thereby became known before the final adjustment, carried along with it these consequences: the *forfeited* reservation would not be deducted from the amount ceded under the 1st and 2d articles of this treaty, because the United States acquired the right to such reservations so forfeited. The United States would have given for such forfeited reservations so *reverted* to the United States, lands on Arkansas in exchange, acre for acre, according to article 5, and must have paid for the improvements thereon, according to the rules prescribed in the 6th and 7th articles.

By this construction all the parts of the treaty are congruous, the one with another; and the construction accords with axioms 4, 8, and 10, before cited.

By this understanding of the treaty, the United States would acquire neither lands nor improvements, by forfeiture of reservations, without paying an equivalent for the improvements and for the lands, and the Indians so removing to Arkansas would get paid the value of their improvements, in money, under the sixth or seventh article, according to the facts, and have their interests in the public domain of lands on the Arkansas and White rivers in fee simple. By this construction all questions of forfeiture for removal would have been matters to be adjusted speedily, whilst the transactions were fresh in mind, and as belonging to, and a part of, the adjustment of the quantity of lands to be ceded to the United States in addition to the territory ceded by the first and second articles, and of the

quantity to be ceded by the United States to the western Cherokees, in exchange, acre for acre. No stale questions of forfeiture would remain to be litigated after the lapse of twenty or thirty years, when witnesses were dispersed or dead, and when the memory of the living, as to past transactions of such antiquity, had faded.

By the contrary construction of making the prohibition unlimited as to time and place of the removal, the United States would acquire, by stale questions of forfeiture raised after the lands ceded to the United States, east of the Mississippi, and the lands ceded in exchange therefor by the United States on the Arkansas and White rivers, had been finally adjusted, after the improvements abandoned to the United States had been ascertained and paid for under the sixth and seventh articles of the treaty of 1817, and the second article of the treaty of 1819; lands and improvements for which they have never given any thing either in land or money; lands and improvements which were deducted out of the lands ceded to the United States by the treaties of 1817 and 1819, and out of the correlative cession due in exchange by the United States of lands on Arkansas.

By such construction the meaning of the words used in the treaty, "remove," "removing," "removed," "to remove," as explained in various parts of the treaty, are wrested from that signification to a different one, contrary to the reason of the treaty, and contrary to the rules of construction, 2, 4, 8, and 10, before cited.

By such construction the Indian families who, by the terms of the treaties, became citizens of the United States, and entitled to the protection of the constitution and laws of the United States, and of the constitution and laws of the States wherein they lived from the time of the treaties of 1817 and 1819, until they removed by invitation of the treaties of 1828 and 1835-'36, are during all that time to be considered as fixtures to the particular tract of land reserved; as villeins regardant; as owners of the freehold estate for life in the soil, with remainder in fee to their children. They are denied the power to occupy their estates by tenants, as other citizens may do; they are denied the protection of the rules of evidence established by the laws of the States in which the lands are situate, to guard against frauds and perjuries in relation to sales and agreements respecting lands; are denied those privileges and immunities which belong to the other citizens of the United States in general, as to the mode of trial of alleged forfeitures; they are, by such constructions of the treaties of 1817 and 1819, put under restrictions and inhibitions, totally inconsistent with the powers and declarations of the federal constitution. A construction which conduces to such absurd consequences should be rejected, according to the rules 2 and 7.

The treaty of 1819 recites that the census provided for by the treaty of 5th July, 1817, had not been taken; and in place of the census, and to the end that a final adjustment might be made without further delay, the Cherokees offered and the United States accepted the cession "of a tract of country at least as extensive as that which they are probably entitled to under its provisions."

By article 1st the Cherokees ceded to the United States a tract of country therein described; and in said article it was "understood and agreed, that the lands hereby ceded by the Cherokee nation are in full satisfaction of all claims which the United States have on them on account of the cession of a part of their nation who have or may *hereafter* emigrate to Arkansas;

and this treaty is a final adjustment of that of 8th of July, eighteen hundred and seventeen."

After this, it seems totally inconsistent with good faith, and the stipulations of this article of the treaty of 1819, for the United States to resort to the treaty of 1817 to work forfeitures for removal from the reservations under that treaty. How can this treaty be a final and full satisfaction and adjustment of that of 1817, if the United States can yet claim the several and respective tracts of 640 acres each, by forfeitures and reversions for non-compliance with the terms of the treaty of 1817?

If an individual, on his private account, were to set up claims in a court of justice against his own solemn deed of release and acknowledgment of final adjustment and satisfaction, and at the end of twenty or thirty years after the date of the deeds, he would be turned out of court; and he, and his special attorney who advised such suits, would be looked upon as shameless knaves, to be shunned by honest men.

Immediately after the ratification of the treaty of 27th February, 1819, all the reservations then registered under the treaty of 1817, and not then forfeited by removal to Arkansas, became absolute and unconditional estates, each head of such Indian family holding an estate for his life, the child or children then in being having a vested remainder in fee, for himself or herself or selves, and for such other child or children as should be born of the marriage, with the right of the wife to be endowed.

This was a reasonable and humane provision, out of the common domain of the Cherokees, for such Indian families as desired to become citizens of the United States, and thereby to separate from the Cherokee nations east and west. It conceded to them their own houses and improvements, the fruits of their own care and labor.

Article 2d of the treaty of 1819 gives reservations of 640 acres "to each head of any Indian family residing within the *ceded territory*, those enrolled for Arkansas excepted, who choose to become citizens of the United States in the manner stipulated in said treaty," (of 1817,) and in that same article the United States agreed to pay for all improvements abandoned, and which were on the land lying within the country *ceded* by the Cherokees, which add real value to the land, according to the treaty of 8th July, 1817.

As to these improvements within the ceded territory abandoned by removal to Arkansas, and so falling to the United States, the reference to the treaty of 1817 shows that they were to be paid for at the time of removal from them.

The 7th article of the treaty of 1819 gave the Cherokees "who resided on the lands ceded by this treaty time to cultivate their crop next summer, (1819;) and for those who do not choose to take reservations, to remove."

By this treaty the reservations were to be taken within the line limited by the seventh article. As there was no census to be taken, the treaty of 1819 having adjusted the division between the eastern and western Cherokees, at the rate of one third part to the latter and two-thirds to the former, and as the United States accepted an additional cession in full of all claims, the subject of removal from the reservations had lost its former importance under the treaty of 1817.

The first, second, and seventh articles of the treaty of 1819, taken together, show that the cession to the United States was by defined boundaries; the reservations to be taken under this treaty were confined within

the ceded territory; the removals were all to be made in the year 1819 by the seventh article. All those who desired to remain, take reservations, and become citizens of the United States, were to do so within that year. All the reservations under the treaty of 1819; all the improvements abandoned and to be paid for by the United States, as well those belonging to the families who did not register for reservations as those who did, and thereafter thought fit to remove to Arkansas, were to be ascertained and determined by the payments to be made by the United States for the improvements which added real value to the land abandoned within the ceded territory. The seventh article of the treaty of 1819 contained a limitation as to reservations and removals, which in the course of the year 1819 settled and determined all. The "manner" alluded to in the second article of the treaty of 1819, by reference to the treaty of 1817, gave a life estate to the head of the Indian family, the remainder in fee to the children, with dower to the widow.

By the terms of the treaty of 1819, and final adjustment and satisfaction therein mentioned, by which the census was also abolished, all the reservations, as well those taken under the treaty of 1817 as those taken under the treaty of 1819, and not abandoned to the use of the United States before the first day of January, 1820, so as to receive payment of the valuation of the improvements so abandoned, became absolute and unconditional estates for life to the head of the Indian family, with remainder in fee to the children, and dower to the widow.

The whole subject of reservations and removals, and forfeitures of reservations for removal, together with the improvements abandoned to the United States, for which payment was to be made according to the second articles of the treaty of 1819, and sixth and seventh articles of the treaty of 1817, was fixed and closed by the close of the year 1819. On the 1st day of January, 1820, the United States had notice of all reservations and improvements abandoned to the United States under the treaties of 1817 and 1819, and of the improvements for which the United States were bound to pay, according to the terms prescribed in the sixth and seventh articles of the treaty of 1817, and second article of the treaty of 1819.

By the treaties, all improvements were treated as private property, and all that were abandoned to the United States by removal to Arkansas, whether within or without the ceded territory, as well on reservations taken and thereafter abandoned to the United States by removal, as improvements not on reservations, were to be paid for by the United States. The poor warriors, whose improvements added no real value to the lands, were compensated in specific commodities. For the improvements adding real value to the land *not ceded*, belonging to those who removed to Arkansas, compensation in money was due by the sixth article of the treaty of 1817; and for like improvements within the *ceded territory*, compensation was due by the terms of the seventh article of the treaty of 1817; and the treaty of 1819 adopted the same rules as to improvements by reference to the treaty of 1817. For the lands ceded, the United States gave lands in exchange on Arkansas; and for all improvements, were to make compensation in money, or other improvements. To get lands by forfeiture, and the improvements thereon, for which nothing has been given by the United States, is totally inconsistent with the true sense and meaning of the treaty.

By the registers kept by the agent of the United States, and now deposited in the Department of War, it appears that one hundred and fifty-six

families took reservations under the treaty of 1817, and that one hundred and fifty five families took reservations under the treaty of 1819—in all, three hundred families—making one hundred and ninety-nine thousand and forty acres deducted out of the quantity ceded to the United States by the treaties of 1817 and 1819, for which the United States did not give lands in exchange on Arkansas, nor pay anything in money, either for those 199,040 acres, or for the improvements thereon. These 311 reservations were, in truth and fact, donations by the Cherokee nation out of their public domain, which the United States did guaranty to the Cherokees forever by the treaties of Holston and Tellico. These donations to the 311 Indian families, so separating from the Cherokee nation and becoming citizens of the United States, were assented to by the United States. By the conjoined and mutual acts of the two contracting powers, these 311 Indian families respectively acquired a complete title in fee simple to their respective tracts of 640 acres of land, including their improvements, with an estate for life to the head of the family, remainder in fee to the children then in life and being, in trust for themselves and for such other children as should be born of their parents, with dower to the widow.

If, after registering for a reservation, any head of these families, before the 1st day of January, 1820, had abandoned his reservation and removed his family to Arkansas, it would have been the duty of the agent of the United States to have noted the fact; and in such case that reservation would not have been deducted from the quantity ceded to the United States; the improvements thereon must have been paid for by the United States, according to the sixth or seventh article of the treaty of 1817, as the case required; and the United States must have given for such tract of land so reverting to the United States, land in exchange, acre for acre, on Arkansas and White rivers.

After the treaty of February 7, 1819, and by virtue thereof, those three hundred and eleven reservations so taken and not abandoned to the United States, not paid for by the United States, neither by lands in exchange acre for acre, nor in money for the improvements, became absolute, unconditional estates in fee simple to the respective families, divested of the condition of forfeiture and reversion to the United States for removal.

It appears from the correspondence between Governor McMinn and J. C. Calhoun, then Secretary of War, that as early as March, 1818, the question had arisen among the Indians whether, after taking reservations, the Indians could surrender them and remove to Arkansas, and have a common right with their brethren there; and that it was determined by Governor McMinn and the Secretary of War, that a Cherokee might take a reservation and thereafter surrender it, and would thereby have a common right with his brethren on the Arkansas, but if he took a reservation and retained it, the reservation of six hundred and forty acres would be a full compensation for all his claims. (See Mr. Calhoun's letter of March 16, 1818, in answer to Governor McMinn's of the 12th and 13th of that month—*American State Papers, Indian affairs*, vol. ii, p. 479.) In the same book, (page 191,) it will be seen that after the treaty of 1819, surveyors were appointed by the Secretary of War, not only to survey and mark the boundaries of the several tracts of country ceded to the United States by the treaties of 1817 and 1819, but likewise to survey the reservations.

This question whether the condition annexed to reservations was of perpetual residence, or only temporary, came directly before the supreme court



of North Carolina, in December, 1834, in the case of *Belk vs. Love*. (1 Devereaux and Battle's Reports, 65 to 75.) The question arose upon a reservation of Yonah, a Cherokee, specially named in the treaty of 1819, and taken by him under that treaty, and by him sold and conveyed to the plaintiff in ejectment by deed of November 1, 1820. The case was decided by the supreme court after argument by Mr. Pearson for the defendant in the ejectment, and by Mr. Badger for the plaintiff in ejectment. Gaston, judge, delivered the opinion of the court; and after commenting upon the treaties of 1817 and 1819, as to the granting of reservations, he said: "The word reservation is used not in a technical, but in a popular sense, meaning a part taken out of the whole and applied differently from the residue."

"It has also been urged that the reservations made are accompanied by a condition of perpetual residence. We think not. A declaration of intent to reside permanently on the tract is made a condition precedent to the allotment of such a tract; but that condition once performed, and the allotment made, the estate is in law absolute."

An inquest of office was indispensably necessary to try and find the fact whereby the lands were to accrue to the United States, or to the State, (for whose use the Indian title was extinguished,) by forfeiture for removal. "These inquests of office were devised by law as an authentic means to give the King his right by solemn matter of record; without which he, in general, can neither take nor part from anything. For it is part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury." These inquests of office and findings are not conclusive, but may be avoided by the subject, by his petition of right, which discloses new facts, or by his *monstrans de droit*, which relies upon the facts as found, or by traverse, or denial of the matter of fact itself, and putting it in a course of trial by the law process of the Court of Chancery. (Black. Comm., book iii, chap. 17, pp. 258, 259, 260; book iv, chap. 23, p. 301; chap. 33, p. 424. Magna Charta, chap. 29, Second Institute, p. 45.)

It is within the power of the government of the United States, by treaty, to make citizens of the United States. The inhabitants of Louisiana and of Florida were made citizens of the United States by treaties. Under the treaties of 1817 and 1819, those Cherokees who declared their wish to become citizens of the United States by filing their names in the office of the Cherokee agent of the United States, (according to those treaties,) and who took reservations, became citizens of the United States, and entitled to the protection, rights, privileges and immunities secured by the constitution of the United States, and particularly to the protection of the fifth article of the amendments thereto, which declares "that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

By the registration for reservations, the heads of Indian families respectively had vested rights in their reservations; each head of a family to an estate for his own life, with remainder in fee immediately vested in the child or children, in life, and being at the time when the particular estate for life vested in the parent.

Whatever the powers of governments may be, by legislative acts, or by treaties having the force of a supreme law, to dispose of private rights to subserve the ends of public policy, their acts ought never to be so construed as to subvert the rights of property, unless the intention so to do be

expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No silent, implied, and constructive forfeitures, or repeals, ought ever to be so understood as to divest a vested right. Such is the general principle expressed and adjudged by the Supreme Court of the United States in the case of *Rutherford vs. Greene's heirs*. (2 Wheat., 203.)

The attempt now is, by implications and constructions, and without due process of law, to work forfeitures for removals, contrary to the principle so stated by the Supreme Court of the United States, and to the general rules 2, 4, 6, 8, and 10, before cited, and to the constitution.

Some families were driven off by force, or fear of harm, by the purchasers under State sales, against which intruders the United States failed to protect, as they undertook to do by the 5th article of the treaty of 1819; some were forced off by purchasers under sales by the agents of the United States; some sold to the State of North Carolina; some sold to the United States under the law of Congress appropriating \$50,000, to be applied in purchasing reservations in the State of Georgia; and some who were forcibly dispossessed by intruders purchasing under State laws recovered their possessions by legal process; others, in attempting to recover their possessions, were unsuccessful for want of white men as witnesses, the law of the State not allowing Indians to testify against white men; and some removed to Arkansas under the inducement of payment for their reservations, held out by the United States in the treaty of 1828; and some, to save themselves from litigation, purchased at the sales made by the States.

These reservations were considered valid titles by the United States and by the several States, when the Indians were solicited to sell or relinquish, and as such they were bought by the United States and by the States, so far as the Indians could be induced to sell; they were considered valid titles in the treaty of New Echota, when by the 1st supplemental article they were all "relinquished" for a compensation promised by the 3d supplemental article, to be adjudged by the commissioners to be appointed under the 17th article.

The State laws, and the documents in the War Department, and the public documents printed by order of the Congress, attest the great efforts, by State laws, State sales, and individual force and intimidations, to drive the Indians from their possessions and reservations. But these have been forgotten when, under the treaty of New Echota, the heads of the Indian families, and their children, have appeared before the commissioners to claim the compensation promised for the general relinquishment and abrogation insisted on by the President of the United States, and inserted in the 1st supplemental article of the treaty of New Echota. The claimants have been obstructed by instructions from the War Department, interpretations and opinions of Attorneys General, made up for the executive officers of the United States, without hearing the other party, constituting a black catalogue of premeditated wrongs to the Cherokees.

Before the treaty, and in the treaty, these reservations were considered as valid subsisting rights and interests, to be relinquished and compensated in money. After the treaty, when all these reservations are relinquished and declared void in consideration of the equivalent promised in money, the claims by forfeitures for removal are set up under the treaty of 1817, in bold defiance of the "full satisfaction of all claims," and

"final adjustment" of the treaty of 1817, which is expressed in the 1st article of the treaty of 1819.

During all the time from the treaty of 1819 to the treaty of 1835, and thenceforward until the claims for money in lieu of reservations were presented for adjudication, these claims of forfeitures by removal lay dormant, unasserted by the States, or by the United States. No inquest of office, no proceeding by office found, either State or federal, has been held to inquire into the fact which was to divest the right and title of the Indian, and to vest it in the government by the forfeiture.

A release of the right was sought by the United States, and accepted by the 1st article of the supplemental treaty; a compensation in money for the right so "relinquished" was promised in the 3d supplemental article; and now, after ratification, against the acknowledgment of right contained in the release sought and accepted, against the compensation engaged for the right "relinquished," for the release accepted, a title by forfeiture antecedent to the treaty is set up!

What a difference of behaviour between those agents of the United States who sought, signed, and concluded the treaty of New Echota, and those who are intrusted with the duty of fulfilling the treaty after its ratification!

All the claims to reservations had been filed with the agent of the United States, under the treaties of 1817 and 1819, registered by the agent as far back as the year 1819, and this register had been filed in the Department of War soon after. The claims to reservations were matters of public record, in the keeping of the Department of War, before the treaty of New Echota. A release of those claims was asked and accepted by the United States in the treaty of New Echota. Any claim of the United States to the lands by forfeiture, founded on the fact of removal from the reservations, had accrued before the treaty of New Echota; had preceded the release asked and accepted by the United States; had preceded the promise of compensation for the release. The United States in good faith cannot now set up title by forfeiture in bar of the compensation for the release of the claims to the reservations: the treaty is an answer to any such claims of pre-existing forfeitures. The agents of the United States who have set up such stale claims of forfeiture for removal in derogation of the treaty of New Echota, have sullied the honor of the United States, the faith of the treaty, and done palpable wrong to the claimants of compensation for their reservations so registered and so relinquished by the treaty for promise of payment.

The treaties are not written in the language of the Cherokees, but wholly in the language of the people of the United States. The Indians who made the treaties of 1817 and 1819 acted by interpreters, two in number, one attesting by his mark. Of the warriors, chiefs, and headmen of the Indians, thirty-seven could not write, but signed by their mark: eight only could write their names. These illiterate Indians signed the treaty as explained by interpreters, and as written by the agents of the United States. Under such circumstances, the United States, the guardians of these Indians, cannot take advantage of dubious expressions in one particular part, and therefrom extract a meaning from a detached part different from the tenor of the other parts, wherefrom to raise forfeitures of the lands and improvements, which the United States did not buy nor pay for, but were exceptions out of the lands ceded to the United States. To claim for-

feitures thereof by far-fetched implications, ambiguous expressions, by sticking in the back, and by the abstruse doctrines of contingent remainders, against the reason and spirit of the treaty, is forbidden by the 2d, 4th, 5th, 6th, 8th, and 9th general axioms before cited.

The extremity to which the claims to forfeitures have been pushed by the agents of the United States, and the tenure by which they are claimed, deserve some notice.

By the treaty of Holston of 1791, (1 vol. Laws U. S., 327,) "the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded." And by the treaty of Tellico, in the year 1798, (vol. 1, p. 333,) "in consideration of the relinquishment and cession hereby made, the United States" engaged to deliver certain goods, and to pay an annuity to the Cherokees, "and will continue the guarantee of the remainder of their country forever, as made and contained in former treaties."

By these treaties the Cherokees are acknowledged as a nation capable of the relations of peace and war, having their own government and laws, their own country defined specially by the treaties, their own public domain, the right to hold, use, and occupy their lands forever, subject to the ultimate right of the United States to buy and obtain a cession of their lands, to the exclusion of all foreign nations, States, or people. Such is the true state of the relations between the United States and the Cherokees; so it has been proclaimed to foreign nations by the United States: so is the decision of the Supreme Court of the United States.—(5 Peters, pp. 17, 55; the Cherokee Nation *vs.* The State of Georgia.) The Cherokees "are acknowledged to have an unquestionable right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government."

Such being the present right of the Cherokees, and the remote ultimate right of the United States, in the lands which were the subjects of the treaty of 1817, the eighth article must be understood as the words of both parties to the treaty; as containing an agreement by the Cherokees to give the reservations in "the lands that are now, or may hereafter be, surrendered to the United States," and as containing an assent on the part of the United States so as to give a reservation of 640 acres to each and every head of an Indian family who may wish to become citizens of the United States.

The United States did not buy nor pay for those reservations; they were deducted out of the quantity ceded, out of the quantity paid for by the United States. Until the United States acquired the Indian title, they could not give nor grant the lands to citizens of the United States; neither could the Cherokees, without the assent of the United States, give or grant the lands in fee simple to citizens of the United States. Independently of the general policy of the United States, the act of 30th March, 1802, (chap. 273, sec. 12, vol. 3, p. 463, of Bioren's edition,) positively forbade it unless by treaty or convention. The 8th article required the assent of the Indian nation, and of the United States, to perfect the titles therein granted. The Cherokee nation did agree to give, and the United States did agree to give, the reservations upon the terms expressed in that article. They are the gifts mutually agreed and consented to by the two contracting parties. To found a construction, or a deduction, upon the words "the United States do agree to give," solely and apart from all the other words of that article and of all the other articles, and without regard to the respective rights of the two contracting parties in the subject matter, would violate the 8th rule

of construction before cited, and also this other rule, "we ought always to give to expressions the sense most suitable to the subject, or to the matter to which they relate."—(Vattel, p. 232, sec. 280.)

The subject of the eighth article was a country owned by the Cherokees by a right of occupancy forever—the United States having the sole right to acquire the Indian title. Of that country the United States were to acquire a part by the treaty of 1817, having the known desire to acquire the surrender of the whole at some future period in pursuance of an express obligation to the State of Georgia, and implied obligations to the other States within whose borders the Cherokee country lay. The intention to obtain a further surrender appears in the eighth article. That the United States and the Cherokees should unite in granting estates in fee simple to persons desiring to separate from the Indian nation and become citizens of the United States, was indispensably necessary to a perfect title in fee to such private persons. That the United States should agree that the reservations of 640 acres to each Indian family who were to become citizens of the United States should be taken in the Cherokee country, within the bounds either then surrendered, or thereafter to be surrendered to the United States, was easy, and in furtherance of their policy; seeing that all such reservations, when deducted from the quantity within the boundaries defined in articles 1 and 2, did not decrease the quantity to be surrendered by other boundaries and concessions, but, in so far as the reservations were taken outside of the boundaries defined in articles 1 and 2, if deducted from the quantity within those defined limits, would increase the quantity to be surrendered to the United States within other boundaries thereafter to be assigned, to make up the just proportion for the Cherokees on the Arkansas, and those removing there, and who should declare their intention to remove thither, to be determined by the census to be taken.

That the Cherokees east should have hesitated to assent to that proposition would not have been surprising, seeing that it operated to decrease the quantity which would remain to them after the just proportion to the Cherokees then on Arkansas, and to remove there, was assigned and surrendered to the United States, to be paid for by lands in exchange, acre for acre, to be ceded by the United States, on Arkansas and White rivers, to the western Cherokees. But the whole nation of Cherokees did agree to the terms, as making only a reasonable provision for those of their nation who desired to become citizens of the United States, subject to their laws. It was very far short of their proportion of the lands belonging to the Cherokees. Taking the average number of persons in each family at three, each family would have been entitled to not less than 2,600 acres; and taking the average of four persons to a family, each Indian family would have been entitled to not less than 3,500 acres, according to the quantity of lands owned, compared with the best estimate of the whole number of Cherokees east and west. By taking reservations and becoming citizens of the United States, those families gave up their portions of the annuities, and of the residue of the lands. Words cannot be more explicit to declare the right of the Cherokees residing east of the Mississippi to take reservations within or without the boundaries then defined in the first and second articles of the treaty of 1817; and the greater the number of the reservations taken outside of the territory ceded, the greater the quantity to be ceded (in addition to the tracts defined by articles one and two) to supply the deductions for reservations, and make up the portion for the western Cherokees, according to articles 3, 4, and 5. The policy of the

United States was best subserved by permitting reservations to be taken outside of the boundaries of the two tracts of country specially ceded by articles 1 and 2, inasmuch as the deduction of such reservations from those specific boundaries did but lay the foundation for the additional quantity to be ceded as contemplated in articles three, four, and five; and all the reservations outside of the specified boundaries became parts of the United States, the inhabitants thereof being converted into citizens of the United States, subject to the laws and jurisdiction of the States within whose limits those reservations were respectively situated. Moreover, the dotting of the Cherokee country with reservations and inhabitants, detached from the Indian nation and Indian jurisdiction, and subjected to the jurisdiction of the United States, necessarily incommoded the Indian nation, embarrassed the execution of the Indian laws and government, and thereby excited an inclination in the Cherokees to remove to Arkansas, where they could enjoy in peace and quiet their own government, laws, and usages. The policy of the United States in agreeing, and in inducing the Indians to agree, that the reservations might be taken outside of the boundaries of the two tracts ceded by articles one and two, and that the families thereon should thereby become citizens of the United States, was a masterpiece in the negotiation; which had a powerful effect upon the Cherokee nation, inducing their council very soon after to offer the cession to the United States of a much larger additional territory than that which they would have acquired by the terms of the treaty of 1817, and so to adjust the matter by the treaty of 1819 as to confine reservations thereafter within the limits of the ceded territory.

The policy of the United States was to encourage emigration of the Cherokees to Arkansas, as the most effectual means to get clear of the conflicting obligations of the United States to Georgia, North Carolina, Tennessee, and Alabama, on the one hand, and to the Cherokees on the other. This was the great desire. A minor desire was to induce them to take reservations, and become citizens of the United States, as auxiliary to their removal to Arkansas. It was far from the desire or policy of the United States to throw any obstacles in the way of any of those who should be inclined to remove from the east side of the Mississippi to Arkansas. On the contrary, every encouragement to remove to Arkansas, every persuasion, was used to effect that object. Such policy and such persuasions are to be seen in the correspondence between the Secretary of War with Governor McMinn, of December 2, 1817; March 16, 1818; July 29, 1818; (two letters,) December 29, 1818, and various others, published in *American State Papers—Indian Affairs—vol. 2., p. 478 to 490.* The policy of the eastern Cherokees was to prevent the removals to Arkansas and to discourage the taking of reservations, as will be seen in parts of the correspondence before referred to.

To forfeit reservations for removal to Arkansas after the final adjustment by the treaty of 1819, would have been a great discouragement to removals, and in direct hostility to the avowed policy of the United States which has been pursued not only towards the Cherokees, but towards all the Indian tribes and nations. It has been the anxious desire, the unceasing effort of the United States, to remove all the Indians from within the borders of the States, to the west side of the Mississippi river.

So far from its being allowable to contest the validity of reservations under the treaty of 1817, on the ground that they were in the then un-

ceded territory, the 13th article of the treaty of New Echota expressly confirmed them, "although, by the treaty of 1819, such reservations were included in the unceded lands belonging to the Cherokee nation."

Here it is convenient to repel the rigidity which has been practised by the commissioners towards reservations, in seeking out forfeitures and other obdurate objections, by invoking attention to the clauses of the 13th article, by which it is declared that the claimants shall be entitled to the reservations, "where the terms on which the reservations were made, in the opinion of the commissioners, have been complied with as far as practicable." Mr. J. F. Schermerhorn, the negotiator of the treaty of 1835-'36, states in his diary of the 23d and 28th December, 1835, that "in order to remove complaints as to the non-execution by the United States of the treaties of 1817 and 1819, respecting reservations, and satisfy the Indians of the disposition of the United States to do them ample justice, the article 13th of the treaty was inserted on this subject, which provides for carrying into effect the provisions of former treaties as far as practicable, and which the honor and good faith of the nation render indispensable."—(See Senate doc. No. 120, 25th Cong., 2d sess., 1837-'38, vol. 2, p. 516.)

Well might the Cherokees who witnessed, with amazement, the paltry shifts and far-fetched objections to deny compensations for reservations, raised by the commissioners, in violation of the spirit of this thirteenth article, exclaim: "Our Great Father who promised us justice, who promised to protect us, is gone! This is another father who disowns his children. He does not protect us against his cruel servants."

The commissioners lastly appointed have reported to the President that they have rejected twelve hundred and one claims of all descriptions, and had allowed, in whole or in part, twenty-eight, amounting to thirty-one thousand five hundred and seventy-eight dollars and fifty cents.

It must be confessed that these last commissioners have been very obedient to the instructions and advisements of the War Department; and have manifested a pre-disposition, a pre-determination, for destruction. They did not adventure to issue certificates until the decisions were submitted to the War Department: if there disapproved, the decisions were reversed and annulled. Even their certificates were sent to the War Department, instead of being delivered to the claimants respectively. By their fourth rule it was declared: "The commissioners will not permit any claimant, or person concerned for them, to converse with the commissioners, or their *secretary*, privately, upon the subject of any claim, or matter relating thereto;" whilst they, the commissioners, were instructed "that you fully and freely advise with this department on the several matters committed to you;" and did again and again hold such advisements. Thus a secret court of star-chamber was erected, whose proceedings were as penal and as destructive of the rights of the Cherokee claimants, as the old court of star-chamber was to the rights of British subjects; which, for the just odium into which it had fallen, was abolished by statute of 16 Charles I, chap. 10, to the general joy of the whole nation. The enormous oppressions of that old court of star-chamber are recorded in the histories of the times. The task is ours to give some examples of the enormities practised by this modern court of star-chamber which has recently expired.

That men are fallible; that all judicial tribunals, even those which are of appellate jurisdiction and of the last resort, are subject to the errors inseparable from the imperfections and fallibilities of human nature, is admitted.



As a general principle, it is convenient and proper to presume, when a tribunal of competent and final jurisdiction has examined and adjudicated, that the decision is according to right and justice. But this, like all other general rules, is not without its exception.

If the error be evident, palpable, "*et in re minime dubia*," (in a matter not doubtful,) it then assumes another form; it excites presumption that it was not mere error, but premeditated wrong; and the foreigner, as well as the native, suffering by the wrong, may as reasonably complain as for a wrong committed in any other way. In such case, if no redress be otherwise obtained, a foreign prince may listen to a complaint from his subjects injured by the adjudication; may inquire into its principles, prove their criminality, and, according to the magnitude of the wrong, take his measures of redress, by reprisal, &c., &c.

For these principles the authority of Mr. Jefferson is sufficient; no other need be cited. (See Mr. Jefferson's letter as Secretary of State, of 6th April, 1792, to Mr. Hammond, minister plenipotentiary of Great Britain; American State Papers, Foreign Relations, vol. 1, p. 212.) As clear as was Mr. Jefferson's vindication of the decisions of the State courts against the imputations of the British minister, so clear will be the condemnation of the decisions of the commissioners under the treaty of New Echota, of which we complain.

The moral obligation of the government of the United States to redress without delay these premeditated wrongs committed by the commissioners, without deferring the matter until the Cherokee nation itself shall make formal complaint to this government, is impressed by the following considerations:

1. The decisions complained of were caused by the instructions, promptings, and advisements of an officer of the Department of War, to the court of commissioners established by the treaty of New Echota. These interferences with that tribunal were in violation of the law of nations, and of the faith of the treaty.

2. The government of the United States is responsible for such improper conduct of its own officers towards the court of commissioners established by the treaty, and appointed by the United States.

3. Solemn treaties between the United States and the Cherokees, show that the Cherokees are *under* the protection of the United States; "their relation to the United States resembles that of a ward to his guardian." Let not the United States exhibit to the world such a guardianship of the Cherokees as that described by Sir Edward Coke, "*Quasi agnum lupo committere ad devorandum*," (as if to commit a lamb to a wolf, to be devoured.) To vindicate the honor and good faith of the United States, these instructions should be disavowed by the government; the officer who has so offended should be punished; a commission should be issued to persons of stern integrity, able jurists of high reputation and of undoubted qualifications; to hold their commission, not during the pleasure of the President, but during good behaviour, so long as the business shall require, to examine and adjudicate all claims against the United States arising under the treaty of New Echota.

Of the cases adjudged by the commissioners, the following examples (out of many others) will suffice to show their settled purpose to conform to the instructions and advisements of the Commissioner of Indian Affairs, and to do premeditated wrong to the Cherokees.



An aged female Cherokee, J. Y. Ostah, a widow, and her three children, were, in the year 1818, duly registered for a reservation, including her residence and improvements. She continued to reside thereon until her land was sold under the law of Tennessee as of the public domain of that State: the purchasers pulled down her house and turned her to the winds. In that condition the agent of the United States gave her, in charity, two blankets, worth about ten dollars. The reservation of 640 acres of land was worth not less than three thousand dollars. No agreement of sale of the land is proved even by parol—no writing is pretended. By the law of Tennessee to prevent frauds and perjuries, no verbal agreement for the sale of land is valid. Under the circumstances, if a sale of the tract of land worth three thousand dollars for the two blankets worth ten dollars had been sworn to, yet the value of the land, compared with the value of the two blankets, would have been internal evidence of fraud, imposition, and duress; yet commissioners, two of the commissioners, determined that J. Y. Ostah had sold her land for two blankets, and therefore rejected the claim of her children; she having died. A rehearing and award to the children, of the value of the reservation, was moved before commissioners Harden and Brewster, and they rejected the claim on 14th January, 1847.

Oo-loocha, a widowed Cherokee, the head of her family of two children, was duly registered in 1818 for her reservation, to include her residence and improvements. She continued to reside thereon for years, when she married the Indian chief Path Killer, and went with her husband to his residence, leaving her goods in her house and her live stock on the land. She died soon after she went with her husband to Turkey town. The commissioners adjudged that Oo-loocha had forfeited the reservation by removal; and the claim of her son, Ahama, was rejected by commissioners Kennedy and Wilson. Commissioners Harden and Brewster were moved on the 9th November, 1846, for an allowance of the claim of Ahama, the son of Oo-loocha; they rejected the claim on the 13th January, 1847. In the opinion of these commissioners, neither obedience to her husband, nor her continuous possession by her goods in her house, and her live stock on the farm, could save Oo-loocha from the charge of a voluntary abandonment, removal, and forfeiture; marriage and coverture was no saving; to obey and go with her husband was no excuse; to retain possession by her household goods and by her live stock left on the premises, was not legal; in the opinion of the commissioners, her acts were adjudged to amount to a voluntary removal, and *forfeiture* of the reservation.

The commissioners, Kennedy and Wilson, were under instructions from the War Department, by letter of Mr. Harris of June 19, 1838, that "no payment whatever should be made on account of reservation claims under the treaties of 1817 and 1819;" and Messrs. Harden and Brewster were under the instructions, (as before cited,) that claims passed upon by a former board must be rejected. The commissioners must either obey instructions or lose their places and emoluments of office: it was more convenient to the commissioners that the children of J. Y. Ostah and of Oo-loocha should lose compensation for their reservations, than for the commissioners to disobey instructions and lose their places.

The agent of the United States, in taking enrolments of Indians for removal to Arkansas under the treaty of 1828, prepared his books, and headed the columns for signatures, by the appropriate allusion to the treaty of 1828 and enrolments under it, with a conveyance and release to the United

States of the reservations, to be undersigned by those who should enrol for Arkansas according to the treaty of 1828, with a saving at the foot that they were to be paid for improvements left, "and to receive all other interests from former or future treaties that have or may be concluded between the government of the United States and their tribe east of the Mississippi."

Under this same heading, Abraham Davis signed his name as enrolling for removal from the east side of the Mississippi river to Arkansas, under the terms of the treaty of 1828. This same Abraham Davis, having for wife a Cherokee woman, and three children, had duly registered himself and his family; five in number, in the year 1818, for a reservation under the treaty of 1817, as shown by the register and by his certificate, to include his improvement one and a quarter mile southeast of Gunter's. In pursuance of the last enrolment, Abraham Davis removed to Arkansas. After the treaty of 1835, Abraham Davis presented his claim to commissioners Kennedy, Wilson and Liddell, for compensation for his reservation. The commissioners, Kennedy and Wilson, quote the conveyance and release in part, omitting the saving at the foot of it, and rejected the claim, because, as they say, he had sold and conveyed his reservation to the United States and had removed from it. The decision on its face carries these enormities and absurdities: 1st. In quoting only a part of the release, and garbling its terms. 2d. In denying to the party the compensation promised by the treaty of 1828, under faith of which the enrolment, release and removal to Arkansas were made. 3d. In making a removal invited by the United States and evidenced by the very instrument quoted, and by the book from which it was quoted, such a removal as barred his right to the value of his reservation under the treaty of 1828, and under the treaty of 1835-36.

Thomas Davis, the only surviving child of Abraham Davis and wife, having the entire right of the remainder in fee simple in his own right, and as heir to his deceased father and mother, brother and sister, presented his claim before commissioners Harden and Brewster, who rejected it on the 23d March, 1847. Messrs. Kennedy and Wilson were under instructions from the office of Indian affairs, "that no payment whatever should be made on account of reservation claims under the treaties of 1817 and 1819," and therefore they must reject the claim upon some pretence, no matter how absurd. Messrs. Harden and Brewster were under instructions contained in the letter of Mr. Medill, of the Indian office, before mentioned.

Such decisions bear the brand on their front of intentional wrong.

Betsey Woodward registered herself and child under the treaty of 1817, and continued to reside on the reservation until she married Moses Elder, in 1820, who was killed in the same year. She enrolled for, and removed to Arkansas under the treaty of 1828, having signed the enrolment and release before mentioned. The claim to compensation for her reservation was rejected, because she had removed to Arkansas in 1834 and signed the release aforementioned, and because she had married and gone with her husband in 1820.

James M'Intosh registered for his reservation under the treaty of 1817, and continued to reside on his reservation until 1820; white men settled on it without leave, and threatened to kill him; he went off under fear of his life, as proved by witnesses. Some proof was introduced to prove a verbal sale in 1819. No evidence in writing was produced or pretended. His claim was rejected because of the pretended sale and voluntary removal.

Jesse Scott registered himself, wife, and two children for reservation

under the treaty of 1817, and continued to reside on it until he signed the enrolment and release aforementioned, in 1833, and removed to Arkansas. Commissioners Kennedy and Wilson rejected the application of Jesse Scott for compensation for his life-estate, because of his said release and removal to Arkansas; although the government invited the removal; although the release, on its face, showed the intent and cause, and contained, in law and in fact, a saving of the right to compensation. The claim of the children of Jesse Scott was rejected on the grounds for rejecting the claim of the father.

Isaac Van registered himself and wife for reservation under the treaty of 1817; continued to reside on it in Tennessee, until one Corbit, in 1819, moved into the house, and by threats and force kept possession. In 1832 Isaac Van enrolled for Arkansas, signing the release before mentioned. On his application for compensation a witness swore that "he had *heard* a deed read" from Van to one Boyd for the reservation of Van in consideration of \$1,100. Without any proof of the execution of the deed, without proof of delivery, without production of the deed, or of a copy, without any proof of payment, but upon such equivocal parol proof of a writing heard of, not produced; upon such hearsay of sale, and upon the release in the enrolment aforementioned, the commissioners rejected Van's claim for compensation. No court of justice intending to do right would have received such hearsay, such hearing of a deed. By law, land can only be bargained and sold by writing. By the 12th section of the act of Congress of 1802, March 30, before quoted, an Indian could make no grant, sale, or conveyance to an individual purchaser; such sale and purchase were by that act declared void. By the rules of evidence, that which by the institution of law must exist by deed, must be proved by the production of the deed, unless in extremity, as loss of the deed by fire or other casualty, which must be proved. That it is dangerous, and against the settled rules of law and evidence, to suffer proof by witnesses "that there was such a deed which they have *heard* and *read*," is well shown by the court in Doctor Layfield's case, (10 Coke, 92, (b); and in Littleton, sect. 365; and in Co. Litt., 225.) To every deed there are two things requisite: the one that it be sufficient in law, of which the judges are to determine; the other concerns sealing and delivery, which are matters of fact, to be proved. Men would hold their landed estates by a very feeble tenure if they could be ousted by the oath of a witness that "he heard a deed read," but neither had read it himself nor knew its execution and delivery, nor knew that any payment was made, and when not a copy even was produced to enable the judges to examine its legal effect and sufficiency. And yet by such illegal and vague oath of a witness, the commissioners deprived Isaac Van of the compensation due for his reservation, to which he was entitled by the registry kept by the agent of the United States now on file in the War Department.

The commissioners were instructed and advised to reject claims for reservations, and seized any pretext, however frivolous.

The last example shows an eagerness to destroy a right by admitting and acting upon illegal parol testimony, in defiance of the plainest rules of evidence and against common sense. The case of the children of Culsowee shows the rejection of legal parol evidence.

Culsowee had filed the declaration of her intent to become a citizen of the United States, and to take a reservation for herself and children under

the treaty of 1817. The agent of the United States gave her a certificate of her right to a reservation to include her improvements. The existence of the certificate and the loss of it were proved. The only objection to her claim was that her name did not appear on the register furnished by the War Department to the commissioners. In every matter the claim of Culsowee was complete.

The children of Culsowee presented their claim and adduced the proof. The claim was rejected because the agent of the United States had omitted to register in the book kept by himself, and wholly written by himself, the declaration and application of Culsowee, whereof he had given a certificate.

Culsowee could not make the agent insert her name in his own book, written wholly by himself. She had no control over that. She was not responsible for the accidental omission of the agent of the United States. She had done all in her power; all that the treaty required. She had filed her application with the agent of the United States "in the office of the Cherokee agent"—that was all she was required to do; all she could do. The agent gave her a certificate of the fact and of her right. No principle is more firmly settled than that a party is not to lose his or her right by the omission of a public officer to do his duty, whether by accident, neglect, or by design. The rule of evidence is well settled, that if a bond, a deed, or other writing is destroyed by fire, or lost by time or accident, the right growing out of the written instrument is not lost. The accidental loss of the instrument does not demolish the fact of its previous existence, and secondary evidence is admissible to establish the fact of such previous existence.

In the case of Van, the commissioners admitted illegal parol evidence by a witness "that he had heard a deed read," when no foundation was laid to dispense with the production of the deed if it had been sealed and delivered, and when such hearsay, or "*hear read*," was inadmissible in any state of the case, and upon such illegal evidence the commissioners adjudged against the claim of Van, because it discharged the United States. In Culsowee's case and her children's case, legal parol evidence was rejected; nothing but the writing itself would be received. Thus these commissioners could blow hot and cold; contradictions yes and no, *eodem flatu*, just as it became necessary to destroy claims, and thereby conform to the tenor and effect of instructions. Mr. Harris's letter says, "I am directed by the Secretary of War to instruct you, that in his judgment no payment whatever should be made on account of reservation claims;" "to enable the agents of the government to arrive at the truth, such measures as may seem proper will be adopted." And subsequent instructions from the War Department of 28th September, 1842, of 20th June, 1844, and 27th August, 1846, were very sufficient to give the cue to the commissioners to make war against all claims, *per fas aut nefas*; not forgetting the polished instruction of Mr. Harris of 12th December, 1837, to the commissioners, when sitting in Tennessee, to select and employ counsel to assist them in rejecting claims which they were to adjudicate; and the very refined and modest suggestion of Mr. Medill, Commissioner of Indian Affairs, dated War Department, office Indian affairs, August 27, 1846, to the commissioners, Messrs. Harden and Brewster, sitting in the city of Washington, "that you fully and freely advise with this department touching the matters committed to you."

The claim by the children of William Jones, deceased, shows that their father, said William Jones, duly registered for a reservation in North Carolina, worth at least fifteen dollars per acre, and continued to reside on it and to cultivate it, until it was surveyed by the commissioners of North Carolina, and he was driven off by the white men and was killed two or three years after he took the reservation. The claim of the children was rejected. 1st. Because the courts of North Carolina were open to William Jones for the forcible expulsion. 2d. Because a person by the name of Waka alias Peggy Jones, as the widow of William Jones, had conveyed her right to the State of North Carolina. The true widow, Peggy Jones, filed her affidavit that she had never sold her right. The magistrate, Samuel Sanders, certified her affidavit, and that from the general character of Peggy Jones, the widow of William Jones, he believed the statements in her affidavit to be true. Thus it was evident that Waka alias Peggy Jones, who signed the deed, was not Peggy Jones the widow of William Jones. But the commissioners rejected the claim. The decision that the sale by the widow could bar the vested remainder of the children, was ridiculous; the inference that Waka was the widow of William Jones, without proof and in teeth of the denial on oath of the true widow, was equally so; and the decision that because the courts of North Carolina were open to William Jones for damages for the forcible expulsion from the premises, that therefore he had forfeited his right to the land, was absurd; not error merely, but designed, premeditated wrong.

Messrs. Harden and Brewster took up this case, in the absence of the children of William Jones, without any application to them, and affirmed the decision of the former commissioners, Kennedy, Wilson, and Liddell, because no bill of review or assignment of errors in the former decree had been filed with them.

Chunalusky took a reservation in North Carolina under the treaty of 1819. His claim for compensation was rejected under the pretext that he had sold to the agents of North Carolina. The proof is clear that he was told by the agents that he had no right to a reservation; but that as he had fought bravely under General Jackson, against our Creek enemies, the agents would make him a present of fifty dollars as a reward for his services, and obtained his mark to a writing represented to him to be only a receipt for the fifty dollars, to enable them to show how they had disposed of the money. The proof is clear that the writing was obtained by misrepresentation and fraud. The value of the six hundred and forty acres of land, compared with the fifty dollars, the alleged price paid for it to the Indian Chunalusky, not only corroborates the parol proof of imposition and fraud, but is in itself sufficient evidence of an undue advantage taken of his condition, and of the imposition and deceit.

Hannah Harlin's claim to compensation was rejected as having been forfeited by removal, when the proof was clear that she was forcibly expelled from her reservation.

To these examples of adjudications upon reservations, others would have been added, equally forcible and convincing, of the settled purpose to do premeditated wrong to the Cherokees, had not the Commissioner of Indian Affairs (Mr. Medill) refused to the counsel for the Cherokees the perusal of the recorded decisions of the commissioners, for causes set forth in his letter of September, 1847, in answer to a written request. To that request and answer of Mr. Medill, and the reply thereto of our counsel, remaining

in the office of Indian affairs, we refer, for the purpose of showing the grounds of Mr. Medill's refusal, and the continued purpose of inflicting wrongs upon the Cherokees. If any slight inaccuracies shall be found in this memorial as to the character of the decisions, and the principles of the adjudications, they will find an apology in the refusal of access to the records.

In further illustration of the temper and disposition of the commissioners to do palpable wrong to the Cherokees, we refer to the decision in the case of the children of Lydia Fields. Before the claim was presented to the board, before the evidence was prepared, the commissioners found two depositions taken, (as parts only of the testimony,) which depositions had been lodged for safe-keeping until the whole testimony should be completed. Upon those depositions, without any appearance, without any claim presented for or on behalf of the children in their absence, the commissioners, of their own mere will, unsolicited and unasked, took up the papers and entered a decision rejecting the claim, and had it recorded.

The commissioners surely ought to have known that no court had any rightful authority, any jurisdiction, to decree against persons not in court, who had not appeared, who had not presented a claim, who had never submitted to their jurisdiction. Such a proceeding argues either gross ignorance, or a keen appetite to do premeditated wrong; either of which is disgraceful to the judge and disgusting to the community. This transaction is contrary to the principles of natural justice, of universal obligation. No person can be concluded by a decision pronounced in his absence, in which he was unheard; to which proceeding he was not a party, either by an appearance as a plaintiff or as a defendant, and without notice, actual or constructive, to appear and defend his rights. Such a proceeding is a nullity.

Of the like pruriency for rejecting claims in advance before they were presented, other examples are to be found in the proceedings of commissioners Harden and Brewster, in the catalogue of twelve hundred and one rejected claims, which, with self-commendation and complacency, they have reported to the President, along with twenty-eight only allowed, in whole or in part, costing the treasury no more than thirty-one thousand five hundred and seventy-eight dollars and fifty cents.

The refusal of the Commissioner of Indian Affairs to suffer the public records of the decisions of the commissioners to be inspected by counsel, cuts off many specifications of decisions palpably and absurdly erroneous, and adds another grievance to the catalogue of wrongs which have been heaped upon the Cherokees by the Commissioner of Indian Affairs. Having inflicted injuries by erroneous interpretations of the treaties and improper instructions to the commissioners, the Commissioner of Indian Affairs now seeks to hide the wrongs done to the claimants by locking up the records of the decisions of the commissioners, thereby hoping to prevent the exposure of the palpable and glaring errors, so manifestly improper as to bear internal evidence of premeditated wrongs and passive obedience to the erroneous and meddlesome instructions of the Commissioner of Indian Affairs and influence of the War Department.

By withholding the records, it was intended that the general presumption of fairness in the conduct of the business, and of the correctness of the decisions of the board of commissioners, should be indulged.

The President of the United States has, in his late message, indulged such presumption; and relying upon that, and upon the communications

to him made by persons interested to hide their own misconduct, he has said, "The commissioners appointed under the act of June 27th, 1846, to settle claims arising under the treaty of 1835-'36 with that tribe, have executed their duties; and after a patient investigation and a full and fair examination of all the cases brought before them, closed their labors in the month of July last. This is the fourth board of commissioners which has been organized under this treaty. Ample opportunity has been afforded to all those interested to bring forward their claims. No doubt is entertained that impartial justice has been done by the late board, and that all valid claims embraced by the treaty have been considered and allowed. This result, and the final settlement to be made with this tribe under the treaty of 1846, which will be completed and laid before you during your session, will adjust all questions of controversy between them and the United States, and produce a state of relations with them simple, well-defined, and satisfactory."

Your memorialists, without intending any disrespect to the President of the United States, are compelled, in truth and in defence of their rights, to say that the President has been misinformed; that his ear has been abused; that his confidence has been misplaced; that the commissioners appointed under the act of 1846 have not executed their duties; that they have not investigated the claims fully and fairly; that impartial justice has not been done; that ample opportunity has not been afforded to the claimants; that all just claims have not been allowed.

On the contrary, your memorialists allege, aver, and are ready to prove that the proceedings of the said commissioners appointed under the act of 1846 did not resemble the fairness, patience of investigation, and means of attaining impartial justice, which usually have attended courts of judicature. No notice was given to any claimant that his case was taken up for adjudication; no arguments were allowed to be read to the board; no opinion or decision was read at the board to the claimants or their attorneys. The fixed predetermination was to obey the instructions issued from the War Department; to reject claims; not to examine them impartially.

It is notorious that one of the commissioners was absent from the city of Washington, and from his duties as commissioner under the Cherokee treaty, by far the greater portion of the year, attending to other pursuits and spending his time in Philadelphia; and the journals are falsely made to read as if the board met, when one of the commissioners was not present, but far away, as before stated, and so repeatedly and so long absent as to have caused complaint and remonstrance; and a letter to him at Philadelphia was written by the Commissioner of Indian Affairs, to return to the duties of the commission. In defiance of the facts, the commissioners, by a report to the President of the United States, bearing date July 23, 1847, and by him referred to the office of Indian affairs, and therein remaining, stated that the board was organized on the 31st July, 1846, and closed on the 23d of July, 1847; and from that time to the present (23d July, 1847,) it "has been constantly in session and kept open for the convenience of claimants, for the purpose of filing cases and examining papers and records in the office of the commission, and at the same time the commissioners have been engaged in investigation of the claims presented and rendering decrees therein." Such a report could not be otherwise than matter of astonishment to those who had attended their sittings when held, and had witnessed the absence of one of the commissioners so repeatedly and for such long intervals.



The commissioners required all claims to be filed with the proofs, in writing, by the 25th December, 1846, but enlarged the time to the 1st day of January, 1847. The notice was published in certain newspapers, commencing on the 24th September, 1846, as they say, giving about three months from the first publication for filing the proofs in writing. However sufficient such notice and time to the Cherokee claimants, dispersed in their country on the Arkansas and White rivers, to get their proofs in writing and send them to Washington, in the District of Columbia, might appear to the commissioners, yet to practical business men, and in the eye of impartial reason, such a notice to such a people, of a newly organized court, with such requirements, seems wholly insufficient. In matter of fact it was insufficient; and from the doings of the commissioners, it wears the appearance of having been devised under the false guise of notice and opportunity to the claimants, to enter judgments against them by surprise and want of preparation.

The commissioners, during the short period of time in which they actually were in session, report that they had decided twelve hundred and twenty-nine cases, allowed twenty-eight, and rejected twelve hundred and one. This wonderful despatch in getting over cases in the short space of time whilst the two commissioners were together, resembles the quick progress of the school boy who got over all his lessons by laying down his book and jumping over it.

They did not comprehend their powers, duties, and solemn obligations, nor the extent and duration of their commissions. The law making appropriation for the expenses of the commission, approved 27th June, 1846, provided "that the commission hereby revived shall continue for one year, and no longer." Under that act the commissions to Messrs. Harden and Brewster respectively bear date on the twenty-third day of July, 1846, for one year, (and at the pleasure of the President during that time.) The commission, therefore, expired by its own limitation on the 22d day of July, 1847. They were in commission on the 23d day of July, 1846, and any act by them done within the pale of their commission on that day would have been legal and valid.

Judge Blackstone, in his Commentaries, (vol. 1, p. 463,) says: "Full age, in male or female, is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth."

So in *Fitzhugh vs. Dennington*, (2 Lord Raymond, 1096:) "If a man were born the first of February, and lived to the thirty-first of January, twenty-one years, and then makes his will after five o'clock in the morning, and dies by six at night, that will is good, and the devisor is of age."

So, also, Anonymous, 1 Salk., 44; per Holt, Ch. Justice.

In Clayton's case, 5 Coke's Rep., vol. 1: "Where the indenture of lease for three years henceforth was delivered at four o'clock in the afternoon of the twentieth of June, it was resolved that this lease should end the nineteenth day of June in the third year, for the law in this computation doth reject fractions and divisions of a day."

In Coke's 3d Institute, chap. 7, p. 53, how the year and a day shall be accounted: "If the stroke or poyson be given the first day of January, yet the year shall end the last day of December; for though the stroke or poyson, &c. were given in the afternoon of the first of January, yet that shall be accounted a whole day, for regularly the law maketh no fraction of a day."

In 3 Dyer's Rep., p. 286, case 43, it was adjudged that a lease made on the 8th day of May included that day in its commencement.



The decision in the case of the *King vs. Adderly*, 2 Douglas, p. 464, concurs with the doctrine of the cases before cited.

It is clear that the day on which the commissions bear date, July 23, 1846, is included in the commencement of the commission, and that the commission ended on the twenty-second day of July, 1847; yet Messrs. Harden and Brewster, on the twenty-third day of July, 1847, rejected claims as if their commissions had not expired; every decision made by them on the twenty-third of July, 1847, is null.

Other evidences of their incompetency, unfitness, palpable errors, and passive obedience to the instructions of the War Department, are furnished by the records of their decisions. They took up claims not presented by the persons, and rejected them, in hot haste to decide in favor of the United States, to swell the list of rejected claims, and save the treasury of the United States at the expense of the faith of solemn treaties and honor of the United States, supposing that their decisions, howsoever erroneous in matters not susceptible of doubt, but wearing the appearance of premeditated wrong, would nevertheless be beyond all remedy, and save the treasury of the United States; and such seems to have been the notion of Mr. Medill, the Commissioner of Indian Affairs, in his letter refusing access to the records of the decisions of the commissioners. These men seem to have taken license to do wrong, because there was no court of errors and appeals having cognizance, as an appellate tribunal, to review and reverse their palpable errors and premeditated wrongs.

Some claims for pre-emptions were brought before the second board of commissioners, Messrs. Eaton and Hubley, and allowed, before they were dismissed from office. Such disobedience to the instruction "that there are no pre-emption rights—they were provided for by the 12th article of the original treaty, but abrogated by the 1st of the supplemental articles, and never had more than an inchoate existence," with that other act of disobedience in allowing a claim "virtually rejected" by the former board, by a decision manufactured by the War Department, notwithstanding the instruction "that no case which has been adjudicated by the former board is open to your examination," was too sinful to be endured at the War Department. Messrs. Eaton and Hubley were dismissed.

The reasoning of the Commissioner of Indian Affairs upon the 12th article of the original treaty and 1st article of the supplement, that claims to compensation for pre-emptions should be rejected because they "never had more than an inchoate existence, which is gone," did not satisfy Mr. Harden that the compensation therefor promised by the third supplemental article should be disallowed. Mr. Brewster differed from Mr. Harden. The difference was certified to Mr. Attorney General Clifford, who agreed in opinion with Mr. Brewster; and so this last commission not only rejected all applications for compensation for pre-emptions, but having been furnished with a list of all persons to whom certificates for pre-emptions had been granted, all were taken up and rejected without regarding the non-appearance of the persons.

Not only in pre-emption cases, but in cases of reservations and damages under the 16th article, after a written application to the board not to take them up for adjudication until further proof and argument should be filed, these were taken up and rejected. The spirit and settled purpose to reject claims presented and not presented, so as to bar the claimants and exonerate the treasury, by the notion that rejected claims would not be within

the jurisdiction of any future board which might be instituted, was manifested by this fourth board in the manner of conducting their proceedings, as well as in the decisions which were given.

The case of Nancy Reed and her children, claiming the compensation for the reservation taken by William Reed as the head of the family, was, on the 15th July, 1847, certified to Mr. Attorney General Clifford as upon a difference of opinion between the two commissioners, involving the question how far the act of the head of the family, the tenant for life, could affect the dower of the wife and the remainder in fee to the children. In this proceeding there are features of a peculiar character, deserving particular notice.

The difference of opinion, and certificate thereof to the Attorney General for his decision, bear date on the 15th of July, 1847; the commission expired on the 22d of July, 1847, (as before explained;) the opinion of the Attorney General bears date on the 22d July, 1847, which was on the day of the expiration of the commission; and on the 23d day of July, 1847, after Messrs. Harden and Brewster were out of office by the limitation of their commissions, respectively, they entered their decision on the record of their proceedings, rejecting the claim of Nancy Reed (for the value of her dower) and of the children for their estate in fee.

Another matter remarkable is, that decisions by the commissioners, without difference of opinion, involving the like principle, had been before that time signed and recorded in other cases, viz: On the 4th November, 1846, in the case of the children of Joseph Phillips; on the 13th January, 1847, in the case of Ahama, son of Oo-loocha; on the 14th January, 1847, in the case of the children of J. Y. Ostah, or Spoiler; in the case of Thomas Davis, son of Abraham Davis; and in other cases; insomuch that Mr. Brewster had drawn up an opinion in the case of Nancy Reed and her children, expecting it to be signed, as former opinions had been. After the difference was certified, he said, in his opinion and argument in writing, as submitted to the Attorney General, that he had frequently explained what seemed to be the "interpretation of the treaty upon the subject now presented. I thought it unnecessary to iterate and reiterate the reasons which I had assigned, and which had not only become the rule of action for this commission, but had been the accepted version of the treaties ever since they have been executed."

It would seem, from the previous decisions recorded without difference of opinion between these two commissioners, and from the arguments in other cases which had been decided, which arguments were submitted to the Attorney General along with the case of Nancy Reed and children, either that Mr. Harden had not read the evidence and arguments in the cases previously decided by the board, and was unconscious of what he had decided in those previous cases, or that the difference of opinion in the case of Nancy Reed and her children, at that late period, was only colorable, to give an appearance of deliberation, and magnify the closing scene of the tragedy by the appearance of the Attorney General as *dramatis persona*.

Other features in the case not to be overlooked are, that the reservation was taken by Wm. Reed, a white man, in right of his wife, an Indian woman, and her children, under the treaty of 1819, and within the territory of North Carolina ceded by that treaty; the husband, wife, and chil-

dren continued to reside on it until the year 1821, when he became intemperate and abandoned his family, who still continued to reside on the reservation until it was sold in the year 1824 by the State, and the family were frightened from their reservation by the purchaser and a crowd of white men. The claim of Nancy Reed and her children was resisted by an alleged sale to the State of North Carolina, made by Wm. Reed, after he had abandoned his family and taken up with another woman, and of course after the forfeiture by removal is alleged. The alleged sale rests solely upon parol evidence, without any deed or writing proved to have been executed, without any deed or writing produced, without any consideration paid or promised. By this mode of proof the rules of evidence were violated. The Attorney General and Mr. Brewster grounded their opinions of a sale upon this illegal evidence by a parol of a matter which, by institution of law, must be by writing. There was no proof of the loss or destruction of any writing; no proof of the execution of a writing; no writing was proved in evidence. They make such an alleged sale one of the groundworks of their opinion. The sale by the owner of the life estate, upon a nameless consideration, after he had forfeited it by his removal, as is alleged, is made to destroy the remainder in fee of the children, and the right of dower of the wife. Again, the act of Wm. Reed, the husband, in deserting and abandoning his wife and children, whilst they remained on the reservation taken by the white man in right of his Indian wife and her children, is adjudged to be an abandonment of the reservation—a forfeiture. The estate of the children forfeited by the crime of the father!!

The United States allege a sale, in bar of the claim to compensation. If a sale and conveyance was made, the deed is the evidence. No deed, no writing, was produced.

If a forfeiture had accrued for a removal, that matter should have been proved and insisted on by inquest and office found, before the treaty of New Echota. After accepting of a release of the title to the land, and promising payment for such relinquishment, it is too late to go behind the release, and promise of money for it, and allege a previous forfeiture of the title to the lands. To go back and inquire into an act alleged, over which a quarter of a century or more has rolled, for the purpose of raising a question of forfeiture for removal, whereby to escape from the compensation promised for a release in the treaty of New Echota, would seem to the eye of impartial reason a matter too antiquated, too excessively stale, to be used by the government.

The Attorney General Clifford has said in his opinion, speaking of the 8th article of the treaty of New Echota, "It is not a conveyance, but a compact." "The United States contracted 'to give' when the conditions were performed. It was but a covenant to grant, and created no estate, if the head of the family removed from the premises and abandoned the same."

The condition precedent to be performed so that the estate might vest for life to the head of the Indian family, with remainder in fee to the children, and dower to the wife, according to the 8th article of the treaty of 1817, (or 2d article of the treaty of 1819,) was the election to become a citizen of the United States, signified by the register of the names, "to be filed in the office of the Cherokee agent." This condition was performed on the 9th of August, 1819, and the family continued to reside on the reservation as be-

fore mentioned. By the performance of this condition precedent the estate vested in William Reed for his life, with the remainder in fee to the children, (then born and living on the land,) with the right of dower to the wife.

But the Attorney General speaks of "conditions" to be performed. "It was but a covenant to grant, and created no estate, if the head of the family *removed* from the premises." Here the Attorney General has mistaken a subsequent, negative condition concerning removal, for non observance, whereof a vested estate was defeasible, and to return to the grantor, for a precedent affirmative condition to be performed before the estate could take effect. It is as great a blunder as that of putting the cart before the horse.

The proviso in the 8th article is, "that if any of the heads of families, for whom reservations may be made, should remove therefrom, then, and in that case, the right to revert to the United States." How could the right revert or return *to* the United States because of the removal, if the right had never passed *from* the United States, had never vested in the grantee, who was prohibited to remove?

This proviso which prohibited removal was a condition the observance of which consisted in not doing, in not removing; which could not *create* an estate in the Indian family by the observance of it, but could do no more than defeat the executed vested estate, if the head of the Indian family did not abstain from the prohibited act. These distinctions between precedent affirmative conditions to be fulfilled to create an estate or make it take effect, and subsequent negative conditions by non-observance, of which an estate executed and vested may be defeated, are clearly explained by Mr. Justice Doderidge, in Touchstone, chap. vi—of a Condition—pp. 117, 118.

The distinction attempted by the Attorney General between a conveyance and a compact, between a covenant to grant, upon performance of a condition, and an executed estate when the condition had been performed, as used for the purpose and with intent to deny that William Reed and his family had a vested right in the reservation until the question of removal was settled, is refuted by the cases of *Rutherford vs. Greene's heirs*, 2 Wheat., 196-206; *Ladiga vs. Roland & Co.*, 2 Howard, 582-590; *Belk vs. Love*, 1 Devereaux and Battle, 65 to 76.

In the case of *Rutherford vs. Greene's heirs*, the legislature of North Carolina, in the year 1782, enacted that "25,000 acres of land shall be allotted for and given to Major General Nathaniel Greene, his heirs, and assigns, within the bounds of the lands reserved for the use of the army, *to be laid off* by the aforesaid commissioners;" the commissioners thereafter allotted the land to General Greene, and caused a survey to be made in March, 1783, which was returned to the office 11th May, 1783. Chief Justice Marshall and the whole court unanimously determined "that the act of 1782 vested a title in General Greene to 25,000 acres of land, *to be laid off* within the bounds allotted to the officers and soldiers, and that the survey made in March, 1783, gave precision to that title, and attached it to the land surveyed."

The case of *Ladiga vs. Roland* arose under the treaty with the Creek Indians, by which the United States engaged to survey the ceded country as soon as could be conveniently done; "and when the same is surveyed, to allow every head of a Creek family to select one-half section each; a

census of these persons *shall* be taken under the direction of the President, and the selections *shall* be made so as to include the improvements of each person within his selection if it can be so made; and if not, then," &c. Ladiga was one of the Creeks included in the census, and made her selection, including her improvement. The Supreme Court of the United States determined that, by the selection according to the treaty, she "not only has a right to the land in question under the treaty, but one which it protects and guaranties against all the acts which have been done to her prejudice." (2 Howard, 591.)

The case of *Belk vs. Love* was decided by the supreme court of North Carolina, upon solemn argument upon one of these Cherokee reservations, mentioned in the 3d article of the treaty of 1819. That article declares, "it is agreed and understood by the contracting parties that a reservation in fee simple of 640 acres square, to include their improvements, and which are to be as near the centre thereof as may be, *shall be made* to each of the persons whose names are inscribed on the certified list, &c. The reservations are made on the condition that those for whom they are intended shall notify in writing the agent for the Cherokee nation, within six months after the ratification of this treaty, that it is their intention to continue to reside permanently on the land reserved." Yonah was one of the persons alluded to in that article of the treaty, and gave the notice in writing to the Cherokee agent as required by the treaty. The supreme court of North Carolina decided that upon the notice so given, Yonah took under this agreement, treaty, compact, and understanding, a vested interest, a vested estate in fee simple, and that the sale and conveyance by Yonah to Belk, the plaintiff in ejectment, passed the title to him. That by performance of the precedent condition of giving the notice to the Cherokee agent, the title vested.

These decisions prove authoritatively, clearly, and without doubt, that the Attorney General is himself in a very great error when he supposes that the 8th article of the treaty, operating upon the election to become citizens of the United States, and the register of the names filed in the office of the Cherokee agent, according to that article, did not amount to a conveyance, did not vest the title to the land in the head of the family for life, with remainder in fee to the children; that no title passed to them, because, as he says, "it is a very great error to regard the 8th article of the treaty as a conveyance of real estate. It is not a conveyance, but a compact. The United States contracted 'to give' when the *conditions* were performed. It was but a covenant to grant, and created no estate, if the head of the family removed from the premises, and abandoned the same."

Now some men will think, and indeed most men will believe, that the judges of the supreme court of North Carolina, and all the seven judges of the Supreme Court of the United States in the decision in 1817, with Chief Justice Marshall presiding, and the seven judges of the Supreme Court of the United States in the decision in 1844, Mr. Justice Story presiding, (Chief Justice Taney being absent because of severe indisposition,) are more to be relied on as expounders of treaties, conveyances, grants, and conditions, than Mr. Attorney General Clifford.

The Attorney General Clifford's attention was called to the case of *Ladiga vs. Roland*, and to other cases, by the counsel for Mrs. Reed and her children, to show that the reservations described in the 3th article of the treaty of 1817 became vested estates in the children "when the reser-

vee had registered his name with the Cherokee agent." But the Attorney General could not see the similarity in the cases cited to the case of Wm. Reed's reservation, and the bearing which the principles in the adjudged cases so cited had upon the case of the children of Wm. Reed and his Indian wife Nancy. He could not see that the principles established in those cases, if applied to reservations under the treaty of 1817, would prove that upon the registration with the Cherokee agent, according to the 8th article of the treaty of 1817, the estates became vested in the reservees presently, and that they did not remain in abeyance thenceforth, until it should be certainly known whether or not the heads of the families would observe the subsequent negative condition, of not removing from the premises nor abandoning them; but would well and truly keep and observe the said condition, by dying on the premises.

He is dead to the force of truth who has no desire to perceive it, who has no mind to comprehend it, and who is not at liberty to embrace it.

The Attorney General says that the eighth article "was but an executory contract, which the United States were bound to fulfil when the *conditions* upon which it was based were performed. The condition was, that the head of the family should not remove."

Now if that be a condition to be performed before the head of the family could have a vested estate in himself, then, whilst he was alive he might remove and abandon the premises; and therefore, until he died without having removed, the executory contract was not performed on the part of the head of the family, and so the United States were not bound until then to fulfil their part of the executory contract; and as no life estate was vested in the head of the family during his life, no remainder could vest in the children, and so the promise to the children and the wife amounts to nothing but a delusion.

If this idea of the condition "that the head of the family should not remove" must be performed before any estate can take effect, and vest either in the head of the Indian family for his life, or in the children in remainder; and if it be also true that this condition that the head of the family should not remove was not limited in its duration to the period in which the census was expected to have been taken, and did not cease when the census was dispensed with by the satisfactory adjustment in lieu of the census, but continued to operate as prohibiting a removal during the life of the head of the family, and so no estate was vested until that prohibitory condition should be performed and fulfilled, then indeed it would thence follow as a necessary consequence that the last proviso in this 8th article, "that the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty," could not be executed until all the heads of families so registered for reservations were all dead, or had forfeited the reservations by removal; and so the fifth article relative to the lands to be given by the United States in exchange, acre for acre, must have remained unexecuted and suspended, to await such contingencies relative to the deduction of land which may be reserved.

Such absurd consequence would result necessarily from the doctrine of the Attorney General, that "it was but a covenant to give when the conditions were performed," "and no estate was created if the head of the family removed from the premises and abandoned the same."

The radical error in the Attorney General's opinion consists in not un-

derstanding the removal prohibited as being a removal to the Cherokee nation west on the Arkansas, and the prohibition as of temporary and limited duration connected with the census alluded to in article 3, and as ceasing as soon as the proportional partition between the Cherokees east and the Cherokees west was adjusted according to the terms of the treaty of 1819.

Your memorialists most respectfully suggest, and protest, that an Attorney General of the United States is not a proper commissioner under the 17th article of the treaty of New Echota. His official duties as the retained law officer, to argue and defend for the government, begets habits of thinking in favor of the government and against all claims upon the treasury, which render him unfit for an arbitrator and commissioner under that treaty. From his position as a member of the cabinet, of which the Secretary of War is also a member, whose office and seeming authority have been used in all the erroneous instructions to the commissioners, and from his association officially with the accounting officers of the several departments, liable, through the heads of the departments, to be called on for his opinions upon matters to the heads of the departments referred by the various subordinate officers, and especially referred by the accounting officers, whose code of ethics and known rule of action in modern times used and practised (with some few honorable exceptions) requires all claims against the government to be rejected, if possibly they may, in whole or in part, by formal, technical, finical objections—the Attorney General, by such his position and associations, is liable to imbibe the *esprit du corps*.

That the Attorney General shall be a commissioner under the treaty *ex officio*, and solely by his commission of Attorney General, held at the pleasure of the President, does not comport with the sense and spirit of the treaty. An umpire between dissenting commissioners is not an office provided for by the treaty of New Echota. It is (as your memorialists are advised and do most respectfully suggest) an unadvised interpolation of the treaty; a corruption of the text; by which the just rights of your memorialists have been cast into the whirlpool of Executive influence, and lost in its vast profundity.

It is true that four boards of commissioners have been appointed under the treaty of 1835-'36. That four boards have been appointed; that such long vacations between the breaking up of the sittings of this and that board and the sittings of their successors, and such long vacations taken by the last board; that so many interruptions to the sittings of the court of commissioners have happened, are matters in nowise attributable to the Cherokees. They had no art nor part in the appointment of the commissioners, nor in defining the tenures of office expressed in their commissions, nor in the breaking up of their sittings. Those interruptions and delays have been grievous to the Cherokees, and in violation of the spirit of the treaty of New Echota.

Your memorialists feel and know that impartial justice, according to the terms of the treaties, has not been administered to them. A powerful influence against them has been constantly exerted through the instrumentality of the office of Indian affairs, acting in the name and authority of the War Department. Witness the various erroneous instructions issued to every board of commissioners, yet not made known to the claimants, but concealed until after the mischiefs of such secret instructions had been effected; witness the decisions so palpably wrong which have followed; witness the refusal of the Commissioner of Indian Affairs to suffer the

counsel of the claimants to inspect the records of the decisions, and the causes assigned for refusal; witness the tenure of office expressed in all the commissions under the treaty.

Your memorialists have been greatly disappointed because of the lack of independence, qualifications, and fitness of the majority of the commissioners who have from time to time been appointed. The duties and functions of adjudicating between the government of the United States, its majesty, power, wealth, patronage, and influence, of the one party, and the down-stricken Cherokees of the other party, required and merited men of a high order of intellect and acquirements, experience, weight of character, and independence, who should have scorned the proffered leading-strings of the Commissioner of Indian Affairs and of the Department of War.

Your memorialists are sensible that these, their complaints, have been already protracted to very great length; but the errors of the various instructions secretly issued from the office of Indian affairs required answers and refutations. The grievances of your memorialists are great, running through a long series of years of sufferings and endurance, in which their oppressions have been numberless, covering them like the rising flood and pressing them like the weight of waters down. Although the Congress, by act of 2d July, 1836, appropriated \$4,500,000, the amount stipulated to be paid for the lands ceded in the first article of the treaty of 1835, as reduced by the sum of \$500,000, mentioned in the second article, and did, in the same act, appropriate \$600,000 for removals and spoliations, according to the third article of the supplement of 1836; and did also, by act of 12th June, 1838, appropriate \$1,047,067 in addition, "for all the objects in the said third article of the supplement;" yet, no part of the sum of four million five hundred thousand dollars has as yet been distributed per capita among the Cherokees, according to the 15th article of the said treaty of 1835; and by means of the interruptions to the commission stipulated in the 17th article of that treaty, the claims for spoliations, damages, compensations for reservations and pre-emptions, &c., as stipulated in the various original and supplemental articles of said treaty of 1835-'36, have not been fairly and impartially adjudicated and paid, but have been delayed, obstructed, and frustrated by the means and wrongs before alluded to, but yet not fully told, long as this memorial may seem to those who have not felt nor been conversant with the wrongs which have been done to the Cherokees, contrary to the faith of the treaties.

Your memorialists, therefore, pray that the Congress of the United States will be pleased to cause the instructions which have been from time to time issued from the War Department and office of Indian affairs, to the commissioners appointed under the 17th article of the said treaty of New Echota, to be called for and examined by a committee, with power to send for persons and papers, or in such manner as to your honorable body shall seem fit:

That the original records of the decisions of the said commissioners may be called for, with the causes assigned by the Commissioner of Indian Affairs for refusing to permit the records of those decisions to be inspected by the counsel for the claimants; and that the decisions may be examined by a committee, and by the counsel for the claimants:

That a new board of commissioners under the said seventeenth article of the treaty may be instituted; that the tenure of office of said commissioners may comport with said treaty and the constitution of the United



States, and not be dependant upon the will and pleasure of the President; that said board of commissioners be untrammelled by the instructions aforementioned which have been issued from the Department of War and office of Indian affairs, and free to hear applications for new trials and rehearings in cases which have been heretofore decided adversely to the claimants; and to grant the new trials and rehearings, if to the board of commissioners it shall seem, in their discretion, necessary and proper to the attainment of justice and the right of the case; so that the faith of the treaties and the public faith and honor of the government of the United States may be vindicated and preserved inviolate.

And, finally, your memorialists most respectfully and earnestly invoke the attention of the Congress of the United States to the wrongs and grievances hereinbefore mentioned, and pray for such relief and redress as to the wisdom and justice of the Congress shall seem apt and proper.

DECEMBER 21, 1847.

PRESTON STARRITT,  
*For himself and divers other claimants.*

JOHN F. GILLESPIE,  
*Attorney and agent of Thomas Davis, son of Abraham Davis,  
Philips' children, I-yos-Tosh's children, Oo-loocha's son  
Ahama, Betsy Walker, and of forty other Cherokee claimants.*

JOHNSON K. ROGERS,  
*For himself, and as attorney in fact for other Cherokee claimants.*

ANDREW TAYLOR,  
*By his attorney, P. Starritt.*





